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91-356

No.——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE MEAD CORPORATION,
Petitioner,

v.

B.E. TILLEY, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 86-3858

B.E. TILLEY; DAVID H. WALL; WILLIAM L. CROTTS, JR.; CHRISLEY H. REED; J.C. WEDDLE; WILLIAM D. GOODE,
Plaintiffs-Appellants,

v.

THE MEAD CORPORATION,
Defendant-Appellee,

AMERICAN ASSOCIATION OF RETIRED PERSONS; AMERICAN SOCIETY OF PENSION ACTUARIES; PENSION BENEFIT GUARANTY CORP.; AMERICAN ACADEMY OF ACTUARIES,
Amici Curiae.

Argued Feb. 5, 1990

Decided Feb. 26, 1991

As Amended June 3, 1991

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Before WIDENER, MURNAGHAN and CHAPMAN, Circuit Judges.

MURNAGHAN, Circuit Judge:

The case involves whether funds that remain in a single-employer defined benefit pension plan may, upon termination of the plan, revert to the employer prior to satisfaction of the plan's unreduced early retirement benefits. After the Mead Corporation ("Mead") recouped funds that remained in a pension plan without paying such benefits, employees brought suit alleging that Mead had violated the Employees Retirement Income Security Act ("ERISA"). In an earlier decision, we held in favor of the employees, requiring Mead to pay the unreduced early retirement benefits. An ERISA created benefit was deemed to have arisen. However, the Supreme Court reversed us on the issue, determining that the relevant language of ERISA did not itself create benefits but only

protected those benefits arising from other sources. The Supreme Court nevertheless remanded the case so that we could consider two alternate theories that might support a judgment in the employees' favor. We, therefore, proceed to consider whether either of the alternate theories requires a holding that Mead must pay to the plaintiffs the value of their unreduced early retirement benefits.

I.

B.E. Tilley, William L. Crotts, Jr., William D. Goode, Chrisley H. Reed, and J.C. Weddle, collectively referred to as the plaintiffs or the pensioners,[1] were employees of the Lynchburg Foundry Company, which Mead had acquired in 1968 as a wholly-owned subsidiary. They were covered by the Mead Industrial Products Salaried Retirement Plan ("Plan"), which was established by Mead and funded entirely by its contributions.

The Plan offered both normal retirement benefits and early retirement benefits. Normal retirement benefits, payable at age 65, were calculated with reference to a participant's earnings and years of service. Participants became eligible for early retirement benefits at age 55. Early benefits were calculated in the same manner as normal retirement benefits, but the amount payable was discounted by five percent for each year that the participant retired prior to the normal retirement age of 65. However, if a participant had 30 years or more of credited service, then he or she could retire at age 62 and still receive the normal retirement benefits payable at age 65 without any reduction. These "unreduced" early retirement benefits provide the bone of contention in the present dispute.

In 1983, Mead sold the Foundry and terminated the Plan. Participants who were age 55 or older were paid

[1] A sixth plaintiff, David H. Wall, died while the action was pending in the district court. The Supreme Court denied a motion to substitute his executor.

their age 65 benefit reduced five percent for each year they were under age 65. Mead paid the "unreduced" early retirement benefits only to those employees who satisfied both the age (62) and service (30 years) requirements. Tilley, Goode, Reed, and Weddle had over 30 years of credited service but had not yet reached age 62; Crotts had 28 years of service. Each of them received from Mead the present value of his normal retirement benefit—reduced by five percent for each year the participant was under age 65. The lump sum payments they received ranged from $50,000 to $87,000. If the pensioners had received the present value of the "unreduced" early retirement benefits—which they expected to receive upon reaching age 62—each of them would have received, on average, $9,000 more. After the Plan's liabilities, as determined by Mead, were satisfied, nearly $11 million in assets remained in the Plan. Mead recouped the remainder.

The pensioners filed suit in Virginia state court alleging that Mead's failure to pay the present value of the unreduced early retirement benefits violated ERISA. Mead removed the case to the United States District Court for the Western District of Virginia. The district court granted summary judgment for Mead, holding that the plaintiffs were not entitled to the value of the "unreduced" early retirement benefits.

We reversed the judgment of the district court and held that Mead was required to compensate the plaintiffs for the unreduced early retirement benefits. *Tilley v. Mead Corp.*, 815 F.2d 989 (4th Cir. 1987). We reasoned that 29 U.S.C. § 1344(a)(6), which provides for the payment of "all other benefits under the plan" upon termination, encompassed the early retirement benefits at issue. 815 F.2d at 991.

The Supreme Court reversed our decision. *Mead Corp. v. Tilley*, 490 U.S. 714, 109 S.Ct. 2156, 104 L.Ed.2d 796

(1989). The Supreme Court reasoned that § 1344(a) merely provides for the orderly distribution of plan assets to satisfy benefits that have already been earned under either the Plan or ERISA. It does not create additional benefit entitlements. 109 S.Ct. at 2163. In other words, § 1344(a) has a limited function; it is only an allocation mechanism.

But, significantly, the Supreme Court declined to rule on the two other theories advanced by the pensioners in support of their position: (1) that the unreduced early retirement benefits qualify as "accrued benefits," which vested upon termination of the Plan; and (2) that the unreduced early retirement benefits are "contingent rights or liabilities," which under ERISA must be satisfied prior to an employer's recoupment of surplus assets. 109 S.Ct. at 2164. Because we had not reached those issues in our original opinion, the Supreme Court remanded the case so that we could consider them.

Justice Stevens wrote the sole dissent in the case. He agreed that the Fourth Circuit erred in interpreting § 1344(a)(6) as the source of the pensioners' rights to recover the unreduced early retirement benefits. *Id.* at 2164. But he thought that the Court should have considered the plaintiffs' other two arguments instead of remanding the case back to the Fourth Circuit. He concluded that our decision should have been affirmed because he considered the benefits at issue to be "contingent liabilities." *Id.* at 2165. The dissent thus was confined to a protest of the Court's failure to address the other two arguments and the expression of a proposed resolution as to one of them not considered by any other member of the Court.

On remand from the Supreme Court, the pensioners advance the two theories which the Supreme Court declined to consider. They argue that the unreduced early retirement benefits are "accrued benefits" under ERISA.

They also contend that the benefits are "contingent rights or liabilities," which should have been paid prior to Mead's recoupment of the surplus assets.

II.

Under § 411 of the Internal Revenue Code, enacted by Title II of ERISA, Pub.L. No. 93-406, 88 Stat. 901 (1974) (codified as amended at 26 U.S.C. § 411), "accrued benefits" become "nonforfeitable" (vested) upon termination of a qualified pension plan. Code § 411(d)(3). If the unreduced early retirement benefits at issue here are "accrued benefits," then the pensioners had a vested right to those benefits upon plan termination. An analysis of the statutory scheme convinces us, however, that the unreduced early retirement benefits should not be considered "accrued benefits" within the meaning of ERISA.

Section 411(a)(7) defines the "accrued benefit" as

> the employee's accrued benefit determined under the plan and ... expressed in the form of an annual benefit commencing at normal retirement age.

26 U.S.C. § 411(a)(7); *see also* 29 U.S.C. § 1002(23) (same definition of "accrued benefit"). The language of the definition seems to consider only the annual benefits that begin at normal retirement age as "accrued benefits." The definition does not mention the unreduced early retirement benefits that companies, such as Mead, offer to veteran employees in addition to the normal retirement package.

The House Report that accompanied the House version of the bill ultimately enacted as ERISA contains the following:

> The term "accrued benefit" refers to pension or retirement benefits and is not intended to apply to certain ancillary benefits, such as medical insurance or

> life insurance, which are sometimes provided for employees in conjunction with a pension plan, and are sometimes provided separately. . . . Also, the accrued benefit to which the vesting rules apply is *not to include such items as the value of the right to receive benefits commencing at an age before normal retirement age*, or so-called social security supplements. . . .

H.R.Rep. No. 807, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4670, 4726 (emphasis added). The Conference Report, accompanying the final version of the bill, seems to echo the understanding that early retirement benefits were not to be considered accrued benefits:

> Also, the *accrued benefit does not include the value of the right to receive early retirement benefits*, or the value of the social security supplements or other benefits under the plan which are not continued for any employee after he has attained normal retirement age.

H.R.Conf.Rep. No. 1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5054. Nothing in the legislative history supports the pensioners' argument that early retirement benefits are "accrued benefits."

The IRS has promulgated a regulation that accords with the understanding that early retirement benefits are not "accrued benefits" under the statute:

> In general, the term "accrued benefits" refers only to pension or retirement benefits. . . . For purposes of this paragraph *a subsidized early retirement benefit which is provided by a plan is not taken into account*. . . .

Treas. Reg. § 1.411(a)-(7)(a)(1)(ii) (1989).

Indeed, we have previously held that unreduced early retirement benefits are not "accrued benefits." In *Sutton*

v. Weirton Steel Div'n of Nat'l Steel Corp., 724 F.2d 406 (4th Cir.1983, *cert. denied*, 467 U.S. 1205, 104 S.Ct. 2387, 81 L.Ed.2d 345 (1984), employees sued National Steel, claiming that the company's modification of their pension benefits violated ERISA. *Id.* at 409. Although National Steel had guaranteed the payment of the employees' normal retirement benefits in an agreement to sell the division, it had not provided for the payment of the plan's early retirement benefits, which were unfunded and only payable in the event of a plant shut-down. *Id.* We held that the early retirement benefits at issue were not "accrued benefits," and therefore, the company's modification did not violate ERISA. "Any right to payment of benefits before normal retirement age must be found in pertinent employment agreements." *Id.* at 410.

The pensioners, however, cite our opinion in *Collins v. Seafarers Pension Trust*, 846 F.2d 936 (4th Cir. 1988), for the proposition that the early retirement benefits at issue here were accrued benefits. In that case, employees had sued a multiemployer pension plan, claiming that an amendment to the plan had violated ERISA by excluding past service credits from the calculation of "early normal pension" eligibility. *Id.* at 937. We reversed the district court's grant of the defendants' summary judgment motion, concluding that procedural noncompliance had invalidated the amendment. In doing so, we agreed with the district court that "the right to receive a pension for past service is an accrued benefit even before actual retirement." *Id.* at 938. We did not decide, however, that unreduced early retirement benefits are accrued benefits under ERISA. To the extent that the district court opinion in the case, 641 F.Supp. 293 (D.Md. 1986), which was reversed on other grounds, can be read to support such a rule, we reject it as inconsistent with the language and legislative history of ERISA as well as *Sutton*. Rather, we hold that the unreduced early retirement benefits at issue here are not "accrued benefits" within the meaning of ERISA. *See Bencivenga v. West-*

ern Pa. Teamsters & Employers Pension Fund, 763 F.2d 574, 580 (3d Cir. 1985). *But see Amato v. Western Union Int'l,* 773 F.2d 1402, 1414 (2d Cir.1985), *cert. dismissed,* 474 U.S. 1113, 106 S.Ct. 1167, 89 L.Ed.2d 288 (1986).

III.

We thus are brought to the question of whether the unreduced early retirement benefits at issue are "contingent liabilities" that must be satisfied prior to reversion of the Plan's surplus assets to Mead. In harmony with Justice Stevens,[2] we conclude that the terms of the Plan itself, as enforced by ERISA, only permit reversion of the surplus assets after Mead has paid the pensioners the value of the unreduced early retirement benefits. Accordingly, we have no need formally to adjudicate the issue, beset with problems, of whether, in the absence of such terms in the Plan, the provisions of ERISA would still require payment of the benefits here.

A.

Both parties, along with four groups participating as *amici curiae,* have brought forth a mishmash of statutory provisions, regulations, legislative history, and actuarial lore in an attempt to persuade us that ERISA does, or does not, include the unreduced early retirement benefits as "liabilities" of the Plan. 29 U.S.C. § 1344(d)(1) provides that funds may be recouped by an employer only if "all liabilities of the plan to participants and their beneficiaries have been satisfied." Similarly, § 401(a)(2) of the Code requires qualified pension plans to satisfy "all liabilities" before surplus assets may revert to the employer. The pensioners contend that "liabilities" includes "contingent liabilities" and that the unreduced early retirement benefits are contingent liabilities. In that vein,

[2] The other eight Justices did not reject the theory of Justice Stevens' dissent. Rather they did not resolve, but left to another day, the issue presented.

the pensioners point to a Treasury regulation that interprets § 401 of the Code as including both fixed and contingent liabilities. *See* Treas. Reg. § 1-401-2(b)(2) (1989). They also roll out the legislative history of Code § 401 to demonstrate that the original understanding of Congress was that only the surplus resulting from actuarial computational error was revertible, thereby mandating the satisfaction of the unreduced early retirement benefits—for which funds had been set aside. *See* S. Rep. No. 1567, 75th Cong., 3d Sess. 24 (1938).

Mead, however, argues that the unreduced early retirement benefits were not liabilities because no obligation to pay the benefits arose until the employees satisfied both the age and service requirements. Mead also contends that ERISA's notion of liabilities includes only "accrued benefits" under ERISA. *See supra* Part II. They assert that the longstanding administrative practice of the Pension Benefit Guaranty Corporation ("PBGC") and the Internal Revenue Service has been *not* to treat the unreduced early retirement benefits as liabilities that must be satisfied prior to asset reversion. The PBGC, as *amicus curiae*, argues in support of Mead's position. Both the American Society of Actuaries and the American Academy of Actuaries have submitted *amicus curiae* briefs, arguing that the actuarial profession's understanding of ERISA has always been that unearned early retirement benefits are not "liabilities of the plan." [3]

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[3] Another complication is the Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 ("REA"), which amended ERISA, effective July 30, 1984, to require that pension plans treat early retirement benefits *as if they were* "accrued benefits" in some instances. *See* 29 U.S.C. § 1054(g)(2). The present case is governed by pre-REA law; the requirements added by REA are inapplicable. But Mead and the PBGC argue that holding early retirement benefits to be accrued benefits would render REA an unnecessary enactment. They conclude that the enactment of REA sheds light on what ERISA's use of "liabilities" means and that Congress did

We find it unnecessary to resolve the apparent conflict between current practice and legislative and regulatory history because we conclude that the terms of the Plan itself, as enforced by ERISA, compel payment of the unreduced early retirement benefits to the pensioners.[4]

B.

Section 1344(d)(1) provides that the residual assets in a single-employer pension plan may be recouped only if "the plan provides for such a distribution in these circumstances." 29 U.S.C. § 1344(d)(1). Article XIII, § 4(f) *of the Plan* provides that in the case of discontinuance of the Plan:

> Any surplus remaining in the Retirement Fund, *due to actuarial error*, after the satisfaction of all benfit rights or *contingent rights* accrued under the Plan (including any benefits accrued under any Pre-existing Plan), and after distribution of any released reserves as above provided, shall, subject to the per-

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not think "liabilities" included unreduced early retirement benefits or else it would not have passed some of the provisions of REA. Yet the legislation might have been enacted to remove all doubt where there previously had been uncertainty as to what was meant.

[4] The dissent's position that our opinion disregards the Supreme Court's mandate is incorrect. The Court directed us to consider on remand whether the pensioners are entitled to payment of their unreduced early retirement benefits under either of their alternative theories: (1) that the benefits are accrued benefits under ERISA; and (2) that the benefits are liabilities of the plan under 29 U.S.C. § 1344(d)(1)(A). We reject the first theory. Nevertheless, we accept the second theory, that the benefits are liabilities of the plan, because we hold, consistent with Justice Stevens' position, that the language of the plan itself compels payment of the benefits. Whether ERISA would compel payment of the benefits in the absence of such lanugage in the plan is a question that is unnecessary to answer and one whose answer has not been compelled by the Supreme Court.

> tinent provisions of federal or state law, be returnable to [Mead].

Id. (emphasis added). Thus the Plan itself only allows recoupment of surplus funds that result from "actuarial error," and then only after the satisfaction of all "contingent rights accrued under the Plan." We conclude that reversion of the Plan's surplus funds to Mead is only permissible after satisfaction of the pensioner's unreduced early retirement benefit rights because: (1) the funds in the Plan that had been set-aside in expectation of fulfilling the unreduced early retirement benefits did not remain in the Plan "due to actuarial error"; and (2) the benefits at issue are "contingent rights" that must be paid prior to any reversion.

Mead contributed to the Plan in expectation of having to satisfy the unreduced early retirement benefits. When the Plan was terminated, only those employees who had satisfied both the age and service requirements were paid. The employees who, with reason, expected to receive the unreduced early retirement benefits in the future, such as the plaintiffs here, were not paid. The funds that had been set aside in expectation of paying those benefits were recouped by Mead. That surplus, which remained in the Plan only because the value of the unreduced early retirement benfits were not paid, was not "due to actuarial error."

"Actuarial error" seems to reference computational error resulting from inaccurate statistical assumptions. If the Plan's actuary had used precise statistical assumptions regarding the future value of Plan assets and the requirements of its beneficiaries, the Plan would have still contained a surplus on termination—the amount contributed in expectation of satisfying the pensioners' unreduced early retirement benefits, which Mead later decided not to pay.

Mead argues that the contributions made to the Fund in expectation of paying the benefits at issue did consti-

tute actuarial error because the actuaries could not have foreseen termination of the plan or nonpayment of the unreduced benefits. But if "actuarial error" means the cause of whatever remains in the Plan when a class of benefits, reasonably expected by participants and funded all the time the Plan is in operation, is terminated, then the phrase contributes no meaning to the contractual provision and is utterly redundant.[5] More importantly, used in such a way, the word "actuarial" is rendered unnecessary. We interpret "actuarial error," as used in Article XIII of the Plan, so as not to mean the error of correctly calculating the contribution to a fund in expectation of paying a benefit that the company later decides to cancel.

Furthermore, we think that Mead was obligated to pay the unreduced early retirement benefits because the Plan mandated the satisfaction of "contingent rights accrued under the Plan." The unreduced early retirement benefits were "contingent rights" because the Plan was liable to pay them on a contingency, *i.e.*, the plaintiffs' satisfaction of the age and service requirements. "Contingent" means nothing less. In the lay world, it is defined as "likely but not certain to happen." *Webster's New Collegiate Dictionary* 243 (1981). *Black's Law Dictionary* defines "contingent liability" as a liability "which is not now fixed and absolute, but which will become so in the case of the occurrence of some future and uncertain event." *Black's Law Dictionary* 291 (5th ed. 1979). In the ERISA world, the concept of "contingent" is used in a similar fashion:

> [I]f 1,000 employees are covered by a trust forming part of a pension plan, 300 of whom have satisfied all the requirements for a monthly pension, while the remaining 700 employees have not yet completed

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[5] It drastically stretches plain meaning to hold that calculations and set asides, correct when made, later, retroactively, became computation errors when termination made recoupment to the employer possible.

> the required period of service, *contingent obligations* to such 700 employees have nevertheless arisen which constitute "liabilities". . . .

Treas. Reg. § 1.401-2(b)(2) (1989) (emphasis added). The terms of the Plan were written in light of the regulation, which was first promulgated in 1943—long before establishment of the Plan, and conform to the plain meaning of the word "contingent." The plaintiffs would have had a fixed right, a vested right, upon reaching age 62, to the unreduced early retirement benefits. At times before the attainment of age 62 that right still existed though future and uncertain. Therefore, the plaintiff's rights in the unreduced early retirement benefits were "contingent," as the word is commonly used and as it is specifically used under ERISA.

Mead argues, however, that the Plan requires satisfaction of "contingent rights *accrued under the Plan,*" and that the unreduced benefits were not accrued under the Plan, because the employees had not satisfied the conditions for the benefit rights they seek—the age and service requirements. But requiring the employees to have satisfied the conditions for the benefit, making it vest, would make a nullity of the concept of *contingent* rights, which are protected by the terms of the Plan.

Mead might have also argued that "contingent rights accrued" refers to the technical ERISA concept of "accrued benefits," and that because the unreduced early retirement benefits should not be deemed accrued benefits under the statute (*see supra* Part II), they need not be satisfied prior to the reversion of surplus assets. All in all, such an interpretation would require a tremendous leap of faith. The Plan incorporates no such reference to Code § 411(a)(7)'s concept of "accrued benefit," nor does the Plan manifest an intent to effect such an incorporation.

Furthermore, such an incorporation would make little sense. Upon termination of a single-employer defined ben-

efit plan, all accrued benefits vest. "Post-termination *contingent* 'accrued benefits' " is an oxymoron. If we were to conclude that the Plan's protection is coterminous with the scope of ERISA, the word "contingent," as used in the Plan, would become devoid of any meaning. Rather, § 4(f)'s protection of "contingent rights" leads us to conclude that Mead must pay the value of those pension benefits for which it would otherwise have become liable "but for" its termination of the Plan. Because Mead's termination of the Plan was what prevented the pensioners from satisfying the conditions so that the unreduced early retirement benefits could vest, the terms of the Plan allow the surplus funds to revert to Mead only after the unreduced early retirement benefits are satisfied.

Indeed, Justice Stevens, the only Supreme Court justice to reach the issue, also considered the early retirement benefits to be "contingent rights." He noted that the pensioners "have far more than an expectancy interest in early retirement benefits." 109 S. Ct. at 2165. "Their right to payment is contingent only upon their election to retire after reaching age 62." *Id.*[6] Justice Stevens also noted that the pensioners' rights were frustrated entirely by the unilateral actions of Mead. Finally, he recognized that Mead was required, both by IRS rulings and prudent actuarial practice, to accumulate the funds necessary to pay the early retirement benefits at issue. *Id.*

In interpreting the provisions of the Plan, we recognize that ERISA's central policy goals are to protect the interests of employees and to guard against the termination of retirement benefits for which employees have been working. *See* 29 U.S.C. § 1001; *Shaw v. Delta Air Lines*, 463 U.S. 85, 90, 103 S. Ct. 2890, 2896, 77 L. Ed. 2d 490 (1983). We hold that the Plan's provisions compel satisfaction of the unreduced retirement benefits prior to reversion of the surplus assets.

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[6] For four of the five plaintiffs, the expectancy has endured and matured into a reliance for more than 30 years.

We reverse the decision of the district court and remand for further proceedings consistent with this opinion.[7]

REVERSED.

WIDENER, Circuit Judge, concurring:

I concur in the result and in all of the majority opinion. I add only that I especially believe that the rights involved in this case are "contingent rights accrued under the Plan." Maj. op. p. 762. See also the first page of Justice Stevens' dissenting opinion in the opinion of the Supreme Court in case 490 U.S. 714, 109 S.Ct. 2156, 104 L.Ed.2d 796 (1989).

CHAPMAN, Circuit Judge, dissenting:

I dissent from Section III of the majority opinion for two reasons. First, I believe that unreduced early retirement benefits are not "liabilities" within the meaning of § 4044(d)(1)(A). Second, I believe that the language of Mead's Plan itself does not require the payment of unreduced early retirement benefits upon termination of the Plan. Therefore, I would find that the plaintiffs are not entitled to unreduced early retirement benefits from Mead.

I

Initially, I feel that the majority disregards the complete instructions given by the Supreme Court. What the Court said is worth repeating:

> Respondents [Plaintiffs], however, offer two alternative grounds for concluding that ERISA requires payment of unreduced early retirement benefits before surplus assets revert to the employer: first,

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[7] We deny the appellee's pending motion for leave to file a revised statutory appendix as it is unnecessary in light of the availability of the materials the revised appendix includes.

> unreduced early retirement benefits may qualify as "accrued benefits" under ERISA; and, second, unreduced early retirement benefits may be "liabilities" within the meaning of § 4044(d)(1)(A), 29 U.S.C. § 1344(d)(1)(A). Because the court of appeals concluded that § 4044(a)(6) was a source of entitlement for unaccrued benefits, it did not reach these questions. We therefore remand for a determination whether respondents [plaintiffs] are entitled to damages on the basis of either of these alternative theories.

Mead Corp. v. Tilley, 490 U.S. 714, 109 S.Ct. 2156, 2164, 104 L.Ed.2d 796 (1989). Although the majority duly undertakes to resolve the first issue presented by the Court, the majority declines to grapple with the complexities of the second issue, as the Court had requested. Consequently, instead of analyzing the meaning of "liabilities" under § 4044(d)(1)(A), the majority investigates whether "the plan provides for such distribution in these circumstances" under § 4044(d)(1)(C), and holds that it does.

I feel that the majority brushes aside the Supreme Court's quite explicit language requiring this court to ascertain the meaning of "liabilities" under § 4044(d)(1)(A). The Court has held consistently that "an inferior court has no power or authority to deviate from the mandate issued by an appellate court." *Briggs v. Pennsylvania R.R. Co.*, 334 U.S. 304, 306, 68 S.Ct. 1039, 1040, 92 L.Ed. 1403 (1948). *See also* 5B C.J.S. *Appeal & Error* § 1966 (1955) ("On the remand of the cause after appeal, it is the duty of the lower court to comply with the mandate of the appellate court and to obey the directions therein, without variation and without departure from the mandate of the appellate court.").

In this case, the majority deviates from the Court's mandate when it finds it "unnecessary" to resolve an issue

that the Court clearly wanted to be addressed, having called it a "complicated and important issue[] pertaining to the private pensions of million of workers." *Mead Corp.*, 109 S.Ct. at 2164 n. 11. Indeed, the Court felt the issue important enough that it hesitated to plunge forward "[w]ithout the views of agencies responsible for enforcing ERISA *or an opinion by the Court of Appeals.*" *Id.* (emphasis added). By failing to express an opinion on this issue, the majority discards the views submitted by the amici curiae and ultimately delays the development of the law.

However, I think that the majority may address the terms of the plan under § 4044(d)(1)(C), because "[w]hile a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues." *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168, 59 S.Ct. 777, 781, 83 L.Ed. 1184 (1939). Indeed, if the majority had held that unreduced early retirement benefits were "liabilities," then it would have been obliged to address the other two requirements of § 4044(d)(1) which an employer must meet before recouping surplus funds. Consequently, I shall address both the issue remanded by the Court and the issue dealt with by the majority.

II

Section 4044(d)(1)(A) of ERISA states that "any residual assets of a single-employer plan may be distributed to the employer if . . . all liabilities of the plan to participants and heir beneficiaries have been satisfied." 29 U.S.C. § 1344(d)(1)(A). The issue on remand is whether unreduced early retirement benefits are "liabilities of the plan," thereby requiring Mead, upon the termination of its Plan, to distribute any residual assets to the plaintiffs, who had satisfied some but not all of the requirements for entitlement to such benefits. I do not find that unreduced early retirement benefits are "liabilities" for two reasons. First, it appears that this term,

which is not defined in ERISA, does not itself create any liabilities for benefits; such liabilities are created elsewhere in ERISA. Second, even if one looks to the analogous and better-defined use of the term "liabilities" in 26 U.S.C. § 401(a)(2) of the Internal Revenue Code (Code), "liabilities" clearly encompasses only "accrued benefits," which, Section II of the majority opinion says, unreduced early retirement benefits are not.

A. The Meaning of "Liabilities" under ERISA

The plaintiffs' contention—that unreduced early retirement benefits are "liabilities"—turns on the assumption that the word "liabilities" in § 4044(d)(1)(A) has a substantive meaning of its own. The assertion is belied by several facts. First, the only source of liabilities under ERISA is the accrual and vesting provisions outlined in Title I, which sets forth an elaborate framework to determine an employee's right to benefits. *See* 29 U.S.C. §§ 1053-1054. But § 4044 is part of Title IV, which provides for insurance for benefits created elsewhere. Thus, § 4044 simply establishes, as its title indicates, a mechanism for the "[a]llocation of assets," not the creation of liabilities. Moreover, neither ERISA nor its legislative history define the meaning of "liabilities." If Congress meant for the term to create substantive rights in addition to those found elsewhere in ERISA, Congress doubtlessly would have attempted to breathe some meaning into it.

This conclusion follows directly from the Supreme Court's opinion in this case. The Court addressed the issue whether unreduced early retirement benefits must be distributed before an employer can recoup any residual plan assets under § 4044(a)(6), which states that

> [i]n the case of the termination of a single-employer plan, the plan administrator shall allocate the assets of the plan (available to provide benefits) among the

> participants and beneficiaries of the plan in the following order:
>
> * * * *
>
> (6) Sixth, to all other benefits under the plan.

29 U.S.C. § 1344(a)(6). Holding that § 4044(a) is "a distribution mechanism and not a source for new entitlements," the Court explained that

> [s]ection 4044(a) in no way indicates an intent to confer a right upon plan participants to recover unaccrued benefits. On the contrary, the language of § 4044(a)(6)—"benefits *under the plan*"—can refer only to the allocation of benefits provided by the terms of the terminated plan.

Mead Corp., 109 S.Ct. at 2162 (emphasis in original). The Court thought it "inconceivable that [§ 4044(a)] was designed to modify the carefully crafted provisions of Title I," which expressly creates rights to benefits. *Id.* I believe that the Court's analysis of § 4044(a) is equally applicable to § 4044(d)(1)(A) and supports the view that the term "liabilities" does not create a right to any benefits, especially unreduced early retirement benefits.

B. The Meaning of "Liabilities" under the Code

The parties urge this court to look to the similar language and restrictions imposed by § 401(a)(2) of the Code. This section states that a pension constitutes a "qualified trust" entitled to special tax treatment

> if under the trust instrument it is impossible, *at any time prior to the satisfaction of all liabilities* with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be . . . used for, or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries.

26 U.S.C. § 401(a)(2) (emphasis added). We agree with the parties that the meaning of "liabilities" under the

§ 401(a)(2) of the Code and under § 4044(d)(1)(A) of ERISA is the same, making it quite appropriate to ascertain the scope of liabilities under the Code as construed by the Internal Revenue Service (IRS) and the courts. However, the parties dispute whether liabilities under § 401(a)(2) of the Code includes unreduced early retirement benefits, and I would hold that it does not.

In Treas.Reg. §1.401-2(b), the IRS gives two insights into the meaning of "liabilities" in § 401(a)(2).[1] First, the regulations states that "[t]he 'liabilities' as used in section 401(a)(2) includes both fixed and contingent obligations to employees." Treas.Reg. § 1.401-2(b)(2) (1960).[2] *Accord* Rev.Rul. 85-6, 1985-1 C.B. 133, 144. Fixed liabilities, the IRS has further explained, "are the benefits payable to those who have become entitled to them." Rev.Rul. 53-33, 1953-1 C.B. 267, 273. It is manifest that the unreduced early retirement benefits at stake here are not fixed, because none of the plaintiffs had satisfied the Plan's prerequisite that one reach the age of 62. However, contingent liabilities "are the benefit credits *accrued* up to the time of termination of the trust for employees (and their beneficiaries) who might have become

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[1] We note that there is a strong presumption in favor of the validity of Treasury Regulations. *See Bob Jones University v. United States*, 461 U.S. 574, 596, 103 S.Ct. 2017, 2030, 76 L.Ed.2d 157 (1983). Indeed, the Supreme Court urged this court on remand to "consider the views of the PBGC [Pension Benefit Guaranty Corporation] and the IRS," explaining that "[f]or a court to attempt to answer these questions without the views of the agencies responsible for enforcing ERISA, would be to 'embar[k] upon a voyage without a compass.'" *Mead Corp.*, 109 S.Ct. at 2164 (quoting *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568, 100 S.Ct. 790, 798, 63 L.Ed.2d 22 (1980)).

[2] While Treas.Reg. § 1.401-2 predates ERISA, it is applied to post-ERISA plans under Treas.Reg. § 1.401(a)-2. *See Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164, 1170 n. 15 (11th Cir.1988).

entitled to benefits if the trust had been continued indefinitely." *Id* (emphasis added). *Accord* Rev.Rul. 57-163, 1957-1 C.B. 128, 138; Rev.Rul. 61-157, 1961-2 C.B. 67, 79; Rev.Rul. 65-178, 1965-2 C.B. 94, 110; Rev.Rul. 69-421, 1969-2 C.B. 59, 69; Rev.Rul. 71-152, 1971-1 C.B. 126; I.R.S. Pub. No. 778, pt. 3(d) (February 1972).

Under the Code, then, this issue depends on whether plaintiffs' unreduced early retirement benefits had "accrued" at the time the Plan was terminated. Section II of majority opinion has already answered this question in the negative. Analyzing the language, legislative history, and regulatory interpretation of "accrued benefits" as defined by § 411(a)(7) of the Code and § 3(23) of ERISA, the majority held that the unreduced early retirement benefits are not "accrued benefits" under the Code and ERISA. Therefore, "liabilities" under the Code and ERISA does not include unaccrued benefits such as unreduced early retirement benefits. This analysis is fully consistent with my belief, expressed above, that in order to ascertain the scope of "liabilities" under ERISA, it is ultimately necessary to look at the substantive rights created by the vesting and accrual provisions of the statute, as well as the terms of the pertinent plan. *See May v. Houston Post Pension Plan*, 898 F.2d 1068 (5th Cir.1990); and *Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164 (11th Cir.1988).

The plaintiffs contend that the "liabilities" that the employer must satisfy before recoupment only excludes those funds remaining "due to erroneous actuarial computation," citing the other reference to "liabilities" in Treas. Reg. § 1.401-2(b):

> The intent and purpose in section 401(a)(2) of the phrase "prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust" is to permit the employer to reserve the right to recover at the termination of the trust,

> and only at such termination, any balance remaining in the trust which is due to erroneous actuarial computations during the previous life of the trust.

Treas.Reg. § 1.401-2(b)(1). *See also* S.Rep. No. 1567, 75th Cong., 3d Sess. 24 (1938). From this, the plaintiffs reason as follows: first, liabilities thus include all funds comprising correct actuarial computations; second, correct actuarial computations correlate directly with the proper measure of funding for a plan; and third, the proper measure of funding includes, according to the IRS, accounting for the effect of a plan's unreduced early retirement benefit, Rev.Rul. 78-331, 1978-2 C.B. 158 (stating that the requirement under § 412(c)(3) of the Code that actuarial assumptions be reasonable might be violated if the plan ignored "the effect of a plan's subsidized early retirement benefit on the frequency of early retirement"). Therefore, the plaintiffs conclude that liabilities include whatever the employer funds under its plan.

The plaintiffs' logic is seductively simple but fatally flawed. The mere fact that an employer has funded a future benefit based on actuarial assumptions does not mean that an employer has assumed a liability with respect to any particular employee who may become entitled to the benefit. In funding a plan, an employer attempts, with the assistance of an actuary, to make certain that in the aggregate there will be sufficient assets to meet all benefit claims as they arise in the future. The employer does not fund benefits on a present liability basis; no specific assets are set aside for or may be claimed by any employee. An employer incurs a liability and an employee becomes entitled to accumulated funds only when the conditions for receiving a given benefit are met, and no earlier. To link benefits with funding, as the plaintiffs urge, would transform Mead's plan from a defined benefit plan, in which benefits are based typically on a formula taking into account the employee's employ-

ment service and compensation, into a defined contribution plan, in which benefits are based on the amounts contributed and invested. *See Nobers v. Crucible Inc. 1975 Salaried Retirement Plan*, No. 88-1237, slip op. at 7-8 (W.D.Pa. June 21, 1990).

Reflecting this reality, the IRS has adopted a broad construction of the term "erroneous actuarial computation," explaining in Treas.Reg. § 1.401-2(b)(1) that

> [a] balance due to an "erroneous actuarial computation" is the surplus arising because actual requirements differ from the expected requirements even though the latter were based upon previous actuarial valuations of liabilities or determinations of costs of providing pension benefits under the plan and were made by a person competent to make such determinations in accordance with reasonable assumptions as to mortality, interest, etc., and correct procedures relating to the method of funding.

An "erroneous actuarial computation" is not a narrow, technical term; it does not simply refer to a statistical error made at the time of the funding of a plan. This is because an "erroneous actuarial computation" may exist even if the actuarial valuations are made by a "competent" actuary using "reasonable assumptions" and "correct procedures."

Instead, the term "erroneous actuarial computation" is simply short-hand for what is left over after all vested and contingent obligations created in the plan are satisfied. This is plainly evident from the hypothetical used by the IRS in § 1.401-2(b)(1):

> For example, a trust has accumulated assets of $1,000,000 at the time of liquidation, determined by acceptable actuarial procedures using reasonable assumptions as to interest, mortality, etc., as being necessary to provide the benefits in accordance with

> the provisions of the plan. Upon such liquidation it is found that $950,000 will satisfy all of the liabilities under the plan. The surplus of $50,000 arises, therefore, because of the difference between the amounts actuarially determined and the amounts actually required to satisfy the liabilities. This $50,000, therefore, is the amount which may be returned to the employer as the result of an erroneous actuarial computation.

In other words, whatever remains after the satisfaction of "all of the liabilities under the plan" is the result of an "erroneous actuarial computation." [3] Therefore, I would find that the term "erroneous actuarial computation" does not impose any substantive limitation on what an employer can recoup. Such limitations are found in

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[3] The IRS subsequently reiterated this framework:

> Section 1.401-2(b)(2) provides that liabilities that must be satisfied include both fixed . . . and contingent . . . liabilities. *After satisfaction of those liabilities, an employer may recover any remaining funds from the plan as surplus resulting from actuarial error.*
>
> . . . .
>
> For purposes of section 1.401-2(b)(2), the valuation of benefits as permitted under Title IV may be used in determining whether there is any surplus due to an actuarial error. Therefore, *after cash distributions have been made* to the participants in this plan in amounts equal to the present value . . . of their total benefits, *any remaining assets (i.e. those resulting from actuarial error) may revert to the employer* without causing a violation of the non-diversion rule of section 1.401-2 of the regulations.
>
> Similarly, *when fixed and contingent liabilities are discharged* through the purchase of a contract or contracts from an insurance company which provides the benefits with respect to individuals for whom the liabilities are determined, *the remaining assets may be considered surplus arising from actuarial error and revert to the employer.*

Rev.Rul. 83-52, 1983-1 C.B. 87, 87 (emphasis added).

the benefit and accrual provisions of ERISA as well as in the terms of the plan itself.[4]

This is the only coherent and defensible way to construe § 401 of the Code. Giving an independent meaning to the term "erroneous actuarial computation" could produce unwieldy results. For example, if a plan had $10 million in plan assets and only $8 million in vested and contingent rights to benefits upon its termination, and if only $1 million of the remaining $2 million is attributable to "erroneous actuarial computation," using a literal construction of the term, who has what right to the $1 million in pension assets that are not claimed as vested or contingent rights and are not the result of an "erroneous actuarial computation"? Neither ERISA or the Code gives us an answer, most likely because neither intended the term "erroneous actuarial computation" to be interpreted in this literal way, but instead intended that the phrase be interpreted and understood as set forth in the above hypothetical used by IRS.

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[4] The plaintiffs point out that any surplus resulting from "a change in the benefit provisions or in the eligibility requirements of the plan . . . could not revert to the employer because such surplus would not be the result of an erroneous actuarial computation." Treas.Reg. § 1.401-2(b)(1). But the plaintiffs assume incorrectly that a termination of a plan is the same thing as a change in a plan's benefit or eligibility provisions. It is not, as shown by the explicit distinction in Treas.Reg. § 1.401-2(b)(1) between a liquidation of a plan, in which anything left over is the result of an "erroneous actuarial computation," and a change in the plan, in which any surplus caused by the change is not the result of an "erroneous actuarial computation." To hold otherwise would mean that an employer could not terminate a plan without paying all employees the benefits that they might have earned under the plan if it had continued indefinitely. However, this verges on the creation of a "benefit expectations" theory, of which the IRS and courts have disapproved. Gen.Couns. Mem. 39,665 (Sept. 25, 1987), IRS Positions (CCH) ¶ 1971; *Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164, 1173 & n. 20 (11th Cir.1988).

C. The Enactment of the Retirement Equity Act of 1984.

The enactment of the Retirement Equity Act of 1984 (REA) confirms that unreduced early retirement benefits were not liabilities under ERISA before the REA was passed. Section 301(a) of the REA amended § 204(g) of ERISA, 29 U.S.C. § 1054(g), and § 411(d)(6) of the Code, to require that terminating plans treat early retirement benefits as if they were accrued benefits in some circumstances, thereby making any reduction in such benefits prohibited. Specifically, § 301(a) of the REA requires payment of "retirement-type subsid[ies] . . . to a participant who satisfies (either before or after [a plan termination]) the pre-[termination] conditions for the subsidy." 29 U.S.C. § 1054(g)(2). *See also* 26 U.S.C. § 411(d)(6)(B). In other words, an employee has the right to meet the conditions specified in the plan for retirement-type subsidies by continued service with the employer after plan termination. The amount of the subsidy, however, is limited to "benefits attributed to service before" the termination of the plan. *Id.* Thus, the REA only requires payment of benefits accrued at the time of the termination of the plan, and not of benefits that might have accrued subsequently. *See* Rev. Rul. 86-48, 1986-1 C.B. 216, 217; Rev.Rul. 85-6, 1985-1 C.B. 133, 134.

If the plaintiffs are correct—that ERISA requires the payment of unreduced early retirement benefits upon a plan's termination, then the REA is redundant to the extent that it now requires such benefits and creates a contingent liability for them. The majority is not convinced by this argument and suggests that the REA "might have been enacted to remove all doubt where there previously had been uncertainty as to what was meant" under ERISA before the REA. I disagree for several reasons. First, the legislative history indicates that Congress thought it was creating a new benefit un-

der ERISA and the Code. *See* 130 Cong.Rec. H4251 (daily ed. May 22, 1984) (statement of Rep. Erlenborn) (stating that early version of the REA, which did not make retirement-type subsidies accrued benefits, did not "change the definition of accrued benefit so as to in any way affect benefits payable under a terminated plan."); and 130 Cong.Rec. H8763 (daily ed. Aug. 9, 1984) (statement of Rep. Roukema) (stating that section 301(a) of the REA, as finally passed, is a "change from present law" that "means that for sufficient plans, depending on the circumstances, some or all of the plan assets that would otherwise revert to the employer will now have to be allocated to participant benefits.").

Second, the IRS apparently believes that the REA changed prior law. In Rev.Rul. 85-6, 1985-1 C.B. 133, 134, the IRS "consider[ed] Rev.Rul. 83-52, 1983-1 C.B. 87, in light of the enactment of section 301" of the REA, and decided to "modif[y] and superced[e]" the Revenue Ruling's implications for retirement-type subsidies. The IRS concluded that the Code now required an employer to pay "a participant who satisfies (either before or after the [the termination of the plan]), the pre-[termination] conditions for the subsidy." *Id.* As a result, the IRS offered several ways for an employer to meet the vesting requirements in § 411 of the Code and thereby be able to recover the surplus.

Finally, it is clear that the REA does not in any way support plaintiffs' claims under ERISA insofar as they go beyond what the REA requires in two respects. The plaintiffs claim a right to unreduced early retirement benefits, even though they can not satisfy the conditions specified in the plan, and they seek the value of the subsidy not only for pre-termination service but also for post-termination service. If this theory is correct, then the REA actually reduced the protection given to retirement-type subsidies at termination, because the

REA mandates the subsidy only for those employees who actually satisfy the conditions of the plan, and then only based on pre-termination service. This is an unlikely scenario, and for these reasons, I do not believe that the REA simply removed any doubt as to the meaning of ERISA. Instead, the REA created new rights not found under prior law.[5]

III

The majority bases its holding on § 4044(d)(1)(C) of ERISA, which states that the residual assets in a single-employer pension plan may be recouped if "the plan provides for such a distribution in these circumstances." 29 U.S.C. § 1344(d)(1)(C). Article XIII, § 4(f) of the Plan provides:

> Any surplus remaining in the Retirement Fund, *due to actuarial error*, after the satisfaction of all benefit rights *or contingent rights accrued under the Plan* . . . shall, subject to the pertinent provisions of federal or state law, be returnable to the respective Employing Company as determined by the Administrative Committee.

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[5] In finding that unreduced early retirement benefits are not "liabilities" under ERISA and the Code, I do not endorse the Pension Benefit Guaranty Corporation's (PBGC) traditional position insofar as it holds that "liabilities" in § 4044(d)(1)(A) is coextensive with the benefits included in the six priority categories in § 4044(a), and that therefore the scope of liabilities is determined by reference to the benefits allocated according to § 4044(a). *See* 29 C.F.R. § 2618.3, .13, .14, & .15; 40 Fed.Reg. 51,368-51,-370 (1975); and 46 Fed.Reg. 49,842-49,843 (1981). The Supreme Court's ruling in this case expressly held that § 4044(a) is solely an allocation scheme and does not give rise to benefit entitlements.

However, I ultimately rely on the PBGC's position that neither § 4044(d)(1) of ERISA nor § 401(a)(2) of the Code by themselves create liabilities for benefits. The only source of liabilities are the accrual and vesting provisions of Title I of ERISA and § 411 of the Code, the benefits required by § 401(a)(11) of the Code, and the terms of the plan itself.

(emphasis added). The majority interprets this provision to allow recoupment of surplus funds only if two conditions are satisfied: (1) if the surplus funds resulted from "actuarial error;" and (2) after the satisfaction of all "benefit rights or contingent rights accrued under the Plan." The majority concludes that Mead fulfilled neither condition and is therefore not entitled to recoup the surplus. I disagree.

As to the first condition found by the majority, I believe that the majority misconstrues the import of the term "actuarial error." In finding that this term "seems to reference computational error from inaccurate statistical assumptions," the majority analyzes this term in a vacuum, deliberately ignoring the term's obvious origins in Treas.Reg. § 1.401-2(b). It seems self-evident that the term "actuarial error" is coterminus with the term "erroneous actuarial computation," especially given the interchangeable use of the two terms by the IRS in Treas.Reg. § 1.401-2(b) and Rev. Rul. 83-52, 1983-1 C.B. 87. As a result, the IRS's interpretation of the concept is highly relevant to, if not dispositive of, any analysis of the Plan.[6] As discussed above, I believe that the term "erroneous actuarial computation" simply means whatever is left over after all vested and contingent obligations are satisfied, unless the surplus is the result of an amendment to the benefit or eligibility provisions of a

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[6] This is the same approach taken by the Sixth Circuit in *International Union, United Auto, and Agric. Implement Workers of America v. Dyneer Corp.*, 747 F.2d 335, 337 (6th Cir.1984), where the Sixth Circuit, interpreting a plan that used the term "actuarial error." upheld the adoption of the IRS's definition of "actuarial error" in Rev. Rul. 83-52, 1983-1 C.B. 87. *See also Washington-Baltimore Newspaper Guild Local 35 v. Washington Star Co.*, 555 F.Supp. 257 (D.D.C.1983), *aff'd*, 729 F.2d 863 (D.C.Cir.1984); *In re Moyer Co. Trust Fund*, 441 F.Supp. 1128 (E.D.Pa.1977), *aff'd*, 582 F.2d 1273 (2d Cir.1978). *See, generally*, 60A Am.Jur.2d § 950 at 619 & n.29 (1988) ("A court may properly adopt the IRS definition of "actuarial error" to interpret the plan provision.").

plan. Applying that definition to the Plan, it is clear that the surplus funds at stake here are the result of "actuarial error" as that term has been defined by IRS and is applicable to the present facts.

As to the second condition, the majority's interpretation of "contingent rights accrued" suffers from the same tunnel-visioned reasoning as its view of "actuarial error." The words comprising the term "contingent rights accrued" have ample meaning under both ERISA and the Code, and the courts should look to these meanings. Such reliance is justified by the fact that the Plan itself apparently invokes ERISA and the Code by using these words, an invocation that the majority concedes by noting that "[t]he terms of the Plan were written in light of the regulation," i.e., Treas.Reg. § 1.401-2(b). The Plan's intent to borrow the definitions of "contingent" and "accrued" (as well as "actuarial error") is bolstered by the Plan's total failure to define these terms.

Accordingly, there is no doubt that each of the plaintiffs' rights to unreduced early retirement benefits are contingent on attaining the age of 62. But it is apparent that these rights did not accrue in the manner that normal retirement benefits did as Section II of the majority's opinion explains. As a result, the plaintiffs' rights to contingent early retirement benefits had not yet accrued under the Plan. Therefore, I believe that Mead satisfied both conditions set in the Plan and is entitled to recoup the residual assets.

But the majority bypasses ERISA and the Code, declining to apply what it felt was "the technical ERISA concept of 'accrued benefits.'" Instead, the majority claims that a "post-termination contingent 'accrued benefit'" is an "oxymoron" and proceeds to disregard the word "accrued" in order to make sense of the Plan. Such a construction of the Plan is clearly improper when ERISA and the Code, and their regulations, make feasible an interpretation that gives meaning to each and

every word in the Plan. For just as a court, "[i]n construing a statute . . . [is] obliged to give effect, if possible, to every word Congress used," *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339, 99 S.Ct. 2326, 2331, 60 L.Ed.2d 931 (1979); *see also Thurner Heat Treating Corp. v. N.L.R.B.*, 839 F.2d 1256, 1259 (7th Cir.1988), so must a court interpret the language of a contract, such as the Plan here.

For the above reasons, which I believe are in keeping with the mandate of the Supreme Court, I dissent from Section III of the majority's opinion.

SUPREME COURT OF THE UNITED STATES

[No. 87-1868]

MEAD CORPORATION,
Petitioner

v.

B. E. TILLEY *et al.*

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490 US 714

Argued February 22, 1989. Decided June 5, 1989.

OPINION OF THE COURT

Justice Marshall delivered the opinion of the Court.

Today we decide whether, upon termination of a defined benefit plan, § 4044(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat 1025, as amended, 29 USC § 1344(a) (1982 ed and Supp V), requires a plan administrator to pay plan participants unreduced early retirement benefits provided under the plan before residual assets may revert to an employer.

I

A

Congress enacted ERISA in 1974 in part to prevent plan terminations from depriving employees and their beneficiaries of anticipated benefits. 29 USC § 1001(a). Titles

I and II provide requirements for plan participation, benefit accrual and vesting, and plan funding. Title III contains general administrative provisions. Title IV covers the termination of private pension plans, establishes a system of insurance for benefits provided by such plans, and creates a "body corporate" within the Department of Labor, the Pension Benefit Guaranty Corporation (PBGC), to administer that system. § 1302. The PBGC guarantees certain nonforfeitable benefits provided by qualified defined benefit pension plans. § 1322.[1]

A defined benefit plan is one which sets forth a fixed level of benefits. See § 1002(35). Contributions to a defined benefit plan are calculated on the basis of a number of actuarial assumptions about such things as employee turnover, mortality rates, compensation increases, and the rate of return on invested plan assets. See Stein, Raiders of the Corporate Pension Plan: The Revision of Excess Plan Assets to the Employer, 5 Am J Tax Policy 117, 121-122, and n 19 (1986).

When an employer voluntarily terminates a single-employer defined benefit plan, all accrued benefits automatically vest, notwithstanding the plan's particular vesting provisions. 26 USC § 411(d)(3). Title IV of ERISA requires that plan assets be distributed to participants in accordance with the six-tier allocation scheme set forth in § 4044(a), 29 USC § 1344(a). Section 4044(a) provides that plan administrators first distribute nonforfeitable benefits guaranteed by the PBGC, 29 USC §§ 1344(a)(1)-(4) (1982 ed and Supp V);[2] then "all other

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[1] For purposes of Title IV, a "nonforfeitable benefit" means "a benefit for which a participant has satisfied the conditions for entitlement under the plan or the requirements of this chapter." 29 USC § 1301(a)(8).

[2] By assigning the nonforfeitable benefits guaranteed by the PBGC to the first four priority categories, the allocation scheme "protect[s] against evasion of the . . . limits on the [PBGC's] in-

nonforfeitable benefits under the plan," § 1344(a)(5); and finally "all other benefits under the plan," § 1344(a)(6).[3] If the plan assets are not sufficient to cover the benefits in categories 1-4, the PBGC will make up the difference. § 1361. The employer must then reimburse the PBGC for the unfunded benefit liabilities. § 1362. If funds remain after "all liabilities of the plan to participants and their beneficiaries have been satisfied," they may be recouped by the employer. § 1344(d)(1)(A). Similarly, the Internal Revenue Code (Code) conditions favorable tax treatment of the plan on satisfaction of "all liabilities with respect to employees and their beneficiaries under the [plan]" before plan assets may be diverted to others. 26 USC § 401(a)(2).

B

Respondents B. E. Tilley, William L. Crotts, Chrisley H. Reed, J. C. Weddle, and William D. Goode were employees

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surance benefits by use of pension fund assets to first pay uninsured benefits." S. Rep. No. 93-383, p. 84 (1973).

[3] Section 4044(a) provides in relevant part:

"Allocation of assets

"(a) Order of priority of participants and beneficiaries

"In the case of the termination of a single-employer plan, the plan administrator shall allocate the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan in the following order:

"(1) First, to that portion of each individual's accured [sic] benefit which is derived from the participant's contributions to the plan which were not mandatory contributions.

"(2) Second, to that portion of each individual's accrued benefit which is derived from the participant's mandatory contributions.

"(3) Third, to [benefits that retired workers were receiving or could have received had the workers chosen to retire within the three years immediately prior to plan termination.

"(4) Fourth, to all other benefits guaranteed by the PBGC].

"(5) Fifth, to all other nonforfeitable benefits under the plan.

"(6) Sixth, to all other benefits under the plan."

of the Lynchburg Foundry Company (Foundry), formerly a wholly owned subsidiary of petitioner The Mead Corporation (Mead).[4] The five were covered by the Mead Industrial Products Salaried Retirement Plan (Plan). The Plan was funded entirely by Mead's contributions.

As a single-employer defined benefit plan, the Plan set forth a fixed level of benefits for employees. Plan participants who completed 10 years of service attained a vested right to accrued benefits, that is, those benetfis earned under the Plan. App 30 (Plan, Art I, § 13). These benefits included normal retirement benefits, payable at age 65 and calculated with reference to a participant's earnings and years of service. Id., at 37-41 (Plan, Arts IV, § 1(b), V). At age 55, participants were eligible for early retirement benefits, calculated in the same manner as normal retirement benefits, but reduced by five percent for each year by which a participant's retirement preceded the normal retirement age. Id., at 37, 38-39 (Plan, Arts IV, § 2, V, § 2(a)). A subsidized or unreduced early retirement benefit, i.e., a benefit equal to that payable at age 65, was available to participants who had 30 or more years of service and elected to retire after age 62. Id., at 39 (Plan, Art V § 2(b)). The Plan did not provide for any benefits payable solely upon plan termination.

In 1983, Mead sold Foundry and terminated the Plan.[5] Mead paid unreduced early retirement benefits only to

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[4] David H. Wall, another former employee of Mead, was also a party to this action, but he died while the action was pending in the District Court. This Court denied respondents' motion to substitute Richard H. Wall, executor of David H. Wall's estate, for David H. Wall. 488 US 906 (1988).

[5] Mead sought approval of its proposed distribution of plan assets from the PBGC and the Internal Revenue Service (IRS), the two agencies responsible for enforcing ERISA. See 29 USC §§ 1341(a) and (b) (1982 ed, Supp V). The PBGC replied that "[b]ased on the information [Mead] supplied . . ., the assets of this Plan will be sufficient as of [Mead's] proposed date of distribution to discharge

those employees who had met both the age and years of service requirements. At the time Mead terminated the Plan, four respondents had over 30 years of credited service and a fifth had 28. None had reached the age of 62. Thus, each respondent received payment equal to the present value, determined as of the date of distribution, of the normal retirement benefit to which he would have been entitled had he retired at age 65.[6] Had Mead paid the present value of the unreduced early retirement benefits, each respondent would have received on average $9,000 more. App to Brief for Respondents 1. After Mead finished distributing plan assets to plan participants, nearly $11 million remained in the Plan's fund. Mead recouped this money pursuant to Article XIII, § 4(f), of the Plan. App 63.[7]

In 1984, respondents filed suit in the Circuit Court of the City of Radford, Virginia, alleging, inter alia, that the failure to pay the present value of the unreduced early retirement benefits violated ERISA, 29 USC §§ 1103(c), 1104(a)(1)(A), 1106(b), and 1344. Mead removed the case to the United States District Court for the Western District of Virginia. The District Court granted sum-

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when due all obligations of the Plan with respect to guaranteed benefits." App to Pet for Cert 34a. The IRS issued a determination letter which stated that Mead's proposed plan termination would "not adversely affect its qualification for Federal tax purposes" as long as plan assets were not "returned to [Mead] before the plan's liabilities to all plan participants are satisfied." Id., at 30a-31a.

[6] Each of the plaintiffs elected to receive his benefits in a lump sum rather than as an annuity. Tilley received $87,108.74; Wall $65,360.80; Crotts $87,552.03; Reed $69,882.45; Weddle $50,800.35; and Goode $83,923.93.

[7] Section 4(f) of the Plan provides, in relevant part:

"Any surplus remaining in the Retirement Fund, due to actuarial error, after the satisfaction of all benefit rights or contingent rights accrued under the Plan . . ., and after distribution of any released reserves . . . shall, subject to the pertinent provisions of federal or state law, be returnable to [Mead]." App 63.

mary judgment in favor of Mead, concluding that "[t]he Plan's language, the legislative history, and the case law in the fourth circuit . . . clearly demonstrate that early retirement benefits are not 'accrued benefits' under ERISA." Civ Action No. 84-0751 (WD Va, Apr. 18, 1986). It therefore held that respondents were not entitled to additional sums under the Plan and that the assets remaining in the fund could revert to Mead pursuant to 29 USC § 1344(d)(1) and Article XIII, § 4(f), of the Plan.

The Court of Appeals for the Fourth Circuit reversed. 815 F2d 989 (1987). Adopting the reasoning of the Court of Appeals for the Second Circuit in Amato v Western Union Int'l, Inc. 773 F2d 1402 (1985) cert dism'd, 474 US 1113 (1986), the court concluded that before plan assets may revert to an employer, § 4044(a)(6) requires payment of early retirement benefits to plan participants "even if those benefits were not accrued at the time of termination." 815 F2d, at 991. That conclusion, the court stated, was dictated by the language of the statute, its legislative history, and agency interpretation. Id., at 992. Finally, the court provided a formula for determining respondents' damages and specified that the money should be paid in a lump sum.

Because the question decided by the Court of Appeals for the Fourth Circuit is an important one over which the Courts of Appeals have differed,[8] we granted certiorari. 488 US 815 (1988). We now reverse.

II

Respondents concede that, at the time the Plan was terminated, they had not satisfied both the age and service

[8] See Ashenbaugh v Crucible Inc. 1975 Salaried Retirement Plan, 854 F2d 1516, 1529 (CA3 1988), cert pending, No. 88-897; Blessitt v Retirement Plan for Employees of Dixie Engine Co. 848 F2d 1164, 1178-1179 (CA11 1988) (en banc); Amato v Western Union Int'l, Inc. 773 F2d 1402, 1415-1416 (CA2 1985), cert dism'd, 474 US 1113 (1986).

requirements for unreduced early retirement benefits. Nevertheless, they claim that they are entitled to such benefits because, in their view, contingent early retirement benefits, even if unaccrued, are "benefits under the plan" under category 6, § 4044(a)(6), and therefore must be distributed before the employer can recoup any residual plan assets. Brief for Respondents 4.

We note preliminarily that the PBGC has flatly rejected respondents' argument. In the PBGC's view, § 4044(a) "does not create additional benefit entitlements. It merely provides for the orderly distribution of benefits already earned under the terms of a defined benefit plan or otherwise required at termination by other provisions of ERISA." Brief for PBGC as Amicus Curiae 9. The PBGC consistently has expressed this view in Opinion Letters addressing proposed plan terminations. See, e.g., PBGC Opinion Letters Nos. 87-11 (Oct. 22, 1987); 86-5 (Mar. 6, 1986); 86-1 (Jan. 15, 1986). The Department of Labor and the IRS, the other agencies responsible for administering ERISA, agree that category 6 is limited to benefits created elsewhere. See PBGC, IRS, and Labor Department Guidelines on Asset Reversions, 11 BPR 724 (1984).

When we interpret a statute construed by the administering agency, we ask first "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; . . . [but] if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Chevron U.S.A. Inc. v Natural Resources Defense Council, 467 US 837, 842-843 (1984); see also INS v Cardoza-Fonseca, 480 US 421, 446-448 (1987). Thus, we turn first to the language of the statute. See, e.g., Blum v Stenson, 465 US 886, 896 (1984); Consumer Product Safety Comm'n v GTE Sylvania, Inc., 447 US 102, 108 (1980); Nachman Corp. v Pension Benefit Guaranty Corporation, 446 US 359, 373-374 (1980). Sec-

tion 4044(a) in no way indicates an intent to confer a right upon plan participants to recover unaccrued benefits. On the contrary, the language of § 4044(a)(6)—"benefits *under the plan*"—can refer only to the allocation of benefits provided by the terms of the terminated plan. The limited function of § 4044(a) as an allocation mechanism is made clear by its introductory language, which reads: "In the case of the termination of a single-employer plan, the plan administrator shall allocate the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan in the following order." Finally, any possible ambiguity is resolved against respondents by the title of § 4044(a)—"[a]llocation of assets." FTC v Mandel Bros., Inc., 359 US 385, 388-389 (1959).

That § 4044(a) is a distribution mechanism and not a source for new entitlements also is illustrated by the structure of the statute. Title I of ERISA sets forth elaborate provisions to determine an employee's rights to benefits. Those provisions describe in detail the accrual of benefits and the vesting of accrued benefits after service of a fixed number of years. Title IV, which contains § 4044(a), simply provides for insurance for benefits created elsewhere. It is inconceivable that this section was designed to modify the carefully crafted provisions of Title I.

To counter the plain language and clear structure of the statute, respondents rely heavily on legislative history. They contend that Congress' failure to include in category 6 the word "accrued," which appeared in a House version of the statute but did not survive the Conference Committee amendments, evinces an intent to require the provision of unaccrued as well as accrued benefits. We disagree. We do not attach decisive significance to the unexplained disappearance of one word from an unenacted bill because "mute intermediate legislative maneuvers" are not reliable indicators of congressional intent. Trailmobile Co. v Whirls, 331 US 40, 61 (1947); see also Drummond Coal Co. v Watt, 735 F2d 469, 474 (CA11 1984). There

is simply nothing in the legislative history suggesting that Congress intended § 4044(a) to be a source of benefit entitlements rather than an allocation scheme. Neither the House nor the Senate bill provided for allocation of assets on plan termination to benefits that were not created elsewhere.[9] Because the Conference Committee discussed fully the areas where ERISA altered prior law or where the final version of the statute differed from the predecessor bills,[10] it is reasonable to assume that had the

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[9] The final allocation scheme in the House bill consisted of four categories: (1) employee contributions; (2) present value of nonforfeitable benefits in pay status or for which a participant qualified on the date of plan termination; (3) present value of other nonforfeitable benefits; and (4) present value of "accrued benefit[s]" not payable under higher priority categories. HR 2, 93d Cong, 2d Sess, §§ 112(b)(1)-(b)(4) (1974) (as passed by the House on February 28, 1974), reprinted in 3 Legislative History, Employee Retirement Income Security Act (Committee Print compiled for the Senate Committee on Labor), 3957-3958 (1976) (Legislative History). If any assets remained after the satisfaction of these liabilities, the House bill provided for allocation of assets first to investment earnings on employee contributions and then to benefits payable solely upon plan termination. Only then could any remaining assets be recouped §§ 112(d)(1)-(d)(3).

Although the Senate amendment to HR 2 provided for a much simpler allocation scheme, it too was limited to benefits required by the plan or by another ERISA provision: (1) voluntary employee contributions; (2) mandatory employee contributions; (3) benefits in pay status for at least three years; and (4) all other benefits guaranteed by the PBGC. HR 2, 93d Cong, 2d Sess, § 444 (1974) (as passed by the Senate on March 4, 1974), reprinted in 3 Legislative History 3720-3721. The Conference Committee adopted an allocation scheme proposed by the Administration which "combine[d] the best features of the House and Senate bills." Administration Recommendations to the House and Senate Conferees on HR 2 to Provide for Pension Reform 60 (April 1974), reprinted in 3 Legislative History 5107. See also HR Conf Rep No. 93-1280, p 375 (1974), reprinted in 3 Legislative History 4277, 4542.

[10] See, e.g., HR Conf Rep No. 93-1280, pp 268-282 (vesting), reprinted in 3 Legislative History 4535-4549; id., at 306-323 (prohibited transactions), reprinted in 3 Legislative History 4573-4590; id., at 355-356, (salary reduction plans), reprinted in 3 Legislative History 4622-4623.

Conference Committee intended to make § 4044(a) a source of benefit entitlements, it would have discussed the change in the Conference Report.

Respondents offer an alternative statutory argument. They suggest that because all accrued benefits vest upon plan termination pursuant to 26 USC § 411(d)(3), they are nonforfeitable benefits which fall within category 5 of the allocation scheme. Thus, they argue, if category 6 did not cover forfeitable benefits such as the contingent early retirement benefits at issue here, it would serve no purpose.

Respondents are mistaken. The PBGC has consistently maintained that, for purposes of its guarantee and of asset allocation under § 4044(a), the characterization of benefits as forfeitable or nonforfeitable depends upon their status before plan termination. See 29 CFR §§ 2613.6(b) and 2618.2 (1987) ("[B]enefits that become nonforfeitable solely as a result of the termination of a plan [are] considered forfeitable"). Soon after the enactment of ERISA, the PBGC stated that "priority category 6 will contain the value of accrued forfeitable benefits of a participant." 40 Fed Reg 51370 (1975). Thus, according to the PBGC, category 6 provides for the allocation of benefits that are forfeitable before plan termination as well as benefits provided under the plan for payment solely upon plan termination. See 29 CFR § 2618.16 (1987). Respondents have failed to persuade us that the PBGC's views are unreasonable. On the contrary, it is respondents' interpretation which cannot be squared with the statute. For if category 5 included benefits that were forfeitable before plan termination as well as those that were nonforfeitable, there would be no guarantee that nonforfeitable benefits would be paid before forfeitable benefits in cases where plan assets are insufficient to cover both. This result would contravene the clear directive of the allocation scheme to give priority to nonforfeitable benefits.

III

We hold that § 4044(a)(6) does not create benefit entitlements but simply provides for the orderly distribution of plan assets required by the terms of a defined benefit plan or other provisions of ERISA. Because the Court of Appeals relied exclusively on § 4044(a)(6) as the grounds for respondents' entitlement to unreduced retirement benefits upon plan termination, we reverse that judgment. Respondents, however, offer two alternative grounds for concluding that ERISA requires payment of unreduced early retirement benefits before surplus assets revert to the employer: first, unreduced early retirement benefits may qualify as "accrued benefits" under ERISA; and, second, unreduced early retirement benefits may be "liabilities" within the meaning of § 4044(d)(1)(A), 29 USC § 1344(d)(1)(A). Because the Court of Appeals concluded that § 4044(a)(6) was a source of entitlement for unaccrued benefits, it did not reach these questions. We therefore remand for a determination whether respondents are entitled to damages on the basis of either of these alternative theories. In deciding these issues, the Court of Appeals should consider the views of the PBGC and the IRS. For a court to attempt to answer these questions without the views of the agencies responsible for enforcing ERISA, would be to "embar[k] upon a voyage without a compass." Ford Motor Credit Co. v Milhollin, 444 US 555, 568 (1980).[11]

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[11] Although the parties and several amici curiae have discussed these alternative theories before this Court, the PBGC and the IRS have not. The PBGC filed a brief as amicus curiae in support of petitioner but specifically stated: "Like the Fourth Circuit, the PBGC expresses no view on the question, arising under Titles I and II of ERISA, whether early retirement benefits are accrued benefits." Brief for PBGC as Amicus Curiae 6, n 3. The PBGC brief does not mention the § 4044(d)(1)(A) liabilities issue. The IRS did not file a brief before this Court. We are aware that the United States filed an amicus curiae brief on behalf of the IRS in Amato v Western Union Int'l, Inc. 773 F2d 1402 (CA2 1985), arguing that early retirement benefits are accrued benefits protected from elimina-

Because § 4044(a)(6) is solely an allocation provision, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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tion by plan amendment within the meaning of § 411(d)(6) of the Code. However, the parties and amici curiae disagree whether the IRS still holds this view. Compare Brief for Petitioner 32-33, and n 27 ("Treasury Regulations issued in 1988 confirm the IRS's views that an early retirement subsidy is no part of the participant's accrued benefit") with Brief for American Association of Retired Persons as Amicus Curiae 15 ("[T]he IRS has consistently interpreted the term accrued benefit to extend to the type of early retirement benefits at issue in this case"). Without the views of the agencies responsible for enforcing ERISA or an opinion by the Court of Appeals, we are reluctant to address these complicated and important issues pertaining to the private pensions of millions of workers.

SEPARATE OPINION

Justice Stevens, dissenting.

Perhaps the Court is prudent to await the advice of the Solicitor General before deciding the principal question presented by this case. As presently advised, however, I am persuaded that the Court of Appeals reached the right conclusion, even though I agree with the Court that § 4044 (a) (6) is not itself a source of retirement benefits.

In my opinion the early retirement benefits that respondents seek are contingent liabilities that under both ERISA and the Plan must be satisfied before plan assets revert to the employer. Section 4044(d) of ERISA provides that residual assets of a plan may revert to the employer only if three conditions are satisfied, including that "all liabilities of the plan to participants and their beneficiaries have been satisfied" and "the plan provides for such a distribution in these circumstances." 29 USC § 1344(d). Under the Plan, "[a]ny surplus remaining in the Retirement Fund, due to actuarial error, after the satisfaction of all benefit rights or contingent rights accrued under the Plan, . . . shall . . . be returnable to [Mead]." App 63 (Plan, Art XIII, § 4(f)). The term "liabilities," not defined in ERISA itself, is given meaning by a parallel provision in the Internal Revenue Code, 26 USC § 401 (a)(2), which long has been interpreted to require a qualified plan to satisfy both contingent and fixed obligations before any of the plan's assets are diverted to any purpose other than the exclusive benefit of employees and their beneficiaries.[1] Thus, as I understand it, the ques-

[1] "The term 'liabilities' as used in section 401(a) (2) includes both fixed and contingent obligations to employees. For example, if 1,000 employees are covered by a trust forming part of a pension plan. 300 of whom have satisfied all the requirements for a monthly pension, while the remaining 700 employees have not yet completed the required period of service, contingent obligations to such 700 employees have nevertheless arisen which constitute 'liabilities' within the meaning of that term. It must be impossible for the

tion in this case is whether early retirement benefits are contingent liabilities under ERISA or the Plan. The answer, I believe, is yes.

Respondents have far more than an expectancy interest in early retirement benefits. Although the benefits may not be "accrued" in the ERISA sense, respondents have earned them under the Plan by serving over 30 years with Mead, and their right to payment is contingent only upon their election to retire after reaching age 62.[2] Cf. Blessitt v Retirement Plan for Employees of Dixie Engine Co. 848 F2d 1164, 1174, n 22 (CA11 1988) ("[A]n employee is entitled to expect that early retirement provisions in a plan will not be deleted by amendment shortly before the employee qualifies"). Their position is similar to that of those employees whose rights to earned benefits prior to ERISA were frustrated by backloaded accrual schedules and abrupt plan terminations. Respondents' rights have been frustrated by the unilateral action of petitioner. It was precisely to prevent such pre-emptive actions depriving employees with long years of employment of their anticipated retirement benefits that Con-

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employer (or other nonemployee) to recover any amounts other than such amounts as remain in the trust because of 'erroneous actuarial computations' after the satisfaction of all fixed and contingent obligations." Treas Reg § 1.401-2(b)(2), 26 CFR § 1.401-2(b)(2) (1988). In explaining the statutory provisions of the Pension Protection Act, Pub L 100-203, Title IX, §§ 9302-9504, 101 Stat 1330-133 to 1330-382, Congress in 1987 expressed a similar understanding that, under present law, a plan may be voluntarily terminated only "if it has sufficient assets to pay all benefit commitments under the plan" and that all benefits include "all fixed and contingent liabilities to plan participants and beneficiaries." HR Conf Rep No. 100-495, pp 879, 884 (1987).

[2] The Plan provides:

"(b) If a participant with thirty (30) or more years of Credited Service elects to retire on or after he attains sixty-two (62) years of age, he shall be entitled to the Retirement Income provided under Section 1 of Article V without any reduction of benefits." App. 39 (Plan, Art V, § 2(b)).

gress passed ERISA. See Nachman Corp. v Pension Benefit Guaranty Corporation, 446 US 359, 374-375 (1980). Petitioner was required both by IRS rulings and by prudent actuarial practice to accumulate the funds necessary to pay early retirement benefits.[3] It is reasonable to require it to take account of the contingent rights to those benefits of employees who have satisfied the years of service requirement. I would construe contingent rights or liabilities to include respondents' rights to early retirement benefits upon reaching age 62. Accordingly, I would affirm the judgment of the Court of Appeals.

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[3] Under IRS rulings, if a plan has an early retirement benefit, the plan actuary is required to take the possibility of early retirement into account in deriving reasonable actuarial assumptions. See Rev Rul 78-331, 1978-2 Cum Bull 158; Internal Revenue Service Manual, Actuarial Guidelines Handbook, reprinted in 1 CCH Pension Plan Guide ¶ 3565, Ch 520 (1986). See also R. Osgood, Law of Pensions and Profit-Sharing § 3.4.4, p 96 (1984); 4 S. Young, Pension and Profit-Sharing Plans § 18.06[2], pp 18-121 (1988); 5 id., § 22[B].03[8], p 22B.48.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-3858

B. E. TILLEY; DAVID H. WALL; WILLIAM L. CROTTS;
CHRISLEY H. REED; J. C. WEDDLE; WILLIAM D. GOODE,
Plaintiff-Appellant,

v.

THE MEAD CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Virginia, at Roanoke.
James C. Turk, Chief District Judge. (CA-84-0751)

Argued: January 6, 1987 Decided: April 9, 1987

Before WIDENER and CHAPMAN, Circuit Judges, and SIMONS, District Judge for the District of South Carolina, sitting by designation.

Clifford Lee Harrison (Spiers, Stone & Hamrick on brief) for appellant; Charles J. Faruki (Kevin F. O'Neill; Smith & Schnacke; Bernard C. Baldwin, III; Edmunds & Williams on brief) for appellee.

CHAPMAN, Circuit Judge:

The appellants are six former employees of The Mead Corporation. Under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. 1001 et. seq., they seek relief in the form of early retirement benefits from The Mead Corporation Salaried Retirement Plan (the Plan), which was funded entirely by employer contributions and contained a formula setting forth the specific benefits to be received by the participants upon retirement. Under the Plan, the normal retirement age was sixty-five, but under Article V § 2(b) participants with thirty years of service and of age sixty-two could retire with full benefits. In 1983 Mead terminated the Plan and paid early retirement benefits only to those employees who had met both the age and years of service standards. All other employee retirement benefits were determined actuarially as if they would have retired at age sixty-five. There was ten million dollars left in the fund after the payment of all benefits and this amount was recouped by Mead. The six plaintiffs, except W. L. Crotts,[1] had each worked more than thirty years at the time the Plan was terminated, but none had reached the age of sixty-two. They claim that under 29 U.S.C. § 1344(a), which determines the allocation of plan assets upon plan termination, they are entitled to early retirement benefits and Mead is required to compensate them for loss of these early retirement benefits. We agree and reverse.

I.

In 1968, The Mead Corporation (Mead) acquired Lynchburg Foundry Company (Foundry) at which the appellants were salaried employees. The Foundry became a wholly owned subsidiary of Mead and thereafter Mead established the Plan, which was funded entirely by Mead.

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[1] Plaintiff Crotts was employed July 1, 1955 and had 28 years and one month of company service and was 61 years of age when the Plan was terminated.

The appellants were covered by the Plan under which normal retirement was fixed at age sixty-five. Article V § 2(b) of the Plan allowed unreduced early retirement benefits to those employees covered by the Plan who had attained age sixty-two and had thirty years of service. It provided:

> "If a Participant with thirty (30) or more years of credited Service elects to retire on or after he attains sixty-two (62) years of age, he shall be entitled to [full benefits]."

In June 1983, Mead announced the Foundry had been sold to another corporation, and the following month, Mead gave notice to all salaried employees (including plaintiffs) that the Plan would be terminated August 1, 1983.

After securing approval from the Pension Benefit Guaranty Corporation, Mead made lump-sum payments to each plaintiff for all benefits Mead determined were due under the Plan. These benefits were not insubstantial and ranged from $50,800.35 for plaintiff Weddle to $87,552.03 for Mr. Crotts. These lump sum benefits were figured on a retirement age of sixty-five and the plaintiffs contend that the retirement benefits should have been determined as of the early retirement age of sixty-two (62). The difference sought by plaintiffs is determined by figuring the actuarial reduction of about five percent per year from the early retirement date of sixty-two (62) rather than from age sixty-five (65). This difference totals $56,476.92 for the six plaintiffs.

Mead contends that the following agreed facts relieve it from any further responsibility to the six plaintiffs:

(1) The sale of the Foundry did not violate ERISA;

(2) Mead had the right to amend or terminate the Plan at any time;

(3) None of the plaintiffs had attained age sixty-two (62) by the time of Plan termination;

(4) Mead never promised or guaranteed to any of the plaintiffs continued employment lasting until age sixty-two (62);

(5) Plaintiffs had no right to continued employment with Mead after termination of the Plan and sale of the Foundry;

(6) Plaintiffs had no right to continued accrual of benefits after Plan termination;

(7) Each plaintiff conceded that he had no facts to indicate Mead acted in bad faith with regard to the calculation and/or distribution of benefits under the Plan.

The Plan retained ten million dollars in funds after payment of all the benefits (excluding the early retirement benefits). Mead recouped these remaining plan assets.

The district court granted summary judgment in favor of Mead on the grounds that the early retirement benefits were not "accrued benefits" under ERISA because the appellants individually had not reached the requisite age and service-years standard established in the Plan. On appeal, the appellants argue that contingent early retirement benefits are a "benefit" which must be distributed upon plan termination.

II.

When a plan is terminated the order of priority of participants and beneficiaries is set forth in ERISA § 4044 (a), 29 U.S.C. § 1344(a) which provides in part:

> In the case of the termination of a single-employer defined benefit plan, the plan administrator shall allocate the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan in the following order:
>
> . . .
>
> (5) Fifth, to all other nonforfeitable benefits under the plan.

(6) Sixth, to all other benefits under the Plan.

It is obvious from these two sections that there is a difference between "nonforfeitable benefits" and "all other benefits under the Plan". In a persuasive opinion, the Second Circuit in *Amato v. Western Union International, Inc.*, 773 F.2d 1402, 1414-16 (2nd Cir. 1985), held that this "category six" included early retirement benefits, even if those benefits were not accrued at the time of termination. The court pointed to the legislative history applicable to § 4044:

> The Joint Explanatory Statement of the Senate-House Conference Committee on the history of ERISA § 4044 supports appellants' argument that category six is not limited to accrued benefits. H. Conf. Rep. No. 1280, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News, 5038, 5154-55. The House version of the bill included among the benefits for which funds had to be allocated a category entitled "other accrued benefits." The Conference rejected this version and substituted "all other benefits under the Plan," the language of the present statute. Congress thus decided not to limit the allocation requirement to accrued benefits but to require that, as long as assets were available, they should be used to meet participants' benefit expectations based upon the Plan's full benefit structure.

773 F.2d at 1416.

Pension plans are usually submitted to the Internal Revenue Service to be sure that the corporate contributions to such plans are deductible in determining the taxable income of the corporation. The Internal Revenue Code, 26 U.S.C. 401 *et seq.*, sets forth the requirements for qualification of pension plans and Treasury Regulations relating to such plans are found in the Code of Federal Regulations. 29 C.F.R. § 2618.16 (1984) provides:

> "The benefits assigned to priority category 6 with respect to each participant are all of the participant's

> benefits under the plan, whether forfeitable or nonforfeitable."

There is a strong presumption in favor of the validity of Treasury Regulations.

> [E]ver since the inception of the Tax Code, Congress has seen fit to vest in those administering the tax laws very broad authority to interpret those laws. In an area as complex as the tax system, the agency Congress vests with administrative responsibility must be able to exercise its authority to meet changing conditions and new problems.

Bob Jones University v. U.S., 461 U.S. 574, 596 (1983).

Mead argues that our decision in *Sutton v Wierton Steel Division of National Steel Corporation*, 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984), controls the outcome of this case. In *Sutton*, we held "the accrued benefits secured by ERISA do not encompass unfunded, contingent early retirement benefits or severance payments. The Act was not designed to prohibit modification of these ancillary benefits." 724 F.2d at 410.

We do not find *Sutton* controlling. The present case, unlike *Sutton*, does not involve the question of the employer's right to modify early retirement benefit in an unfunded scheme of pension and severance benefits contained in a collective bargaining agreement. We are faced with the termination of an employer funded, defined pension plan which contains early retirement benefits, which plan was terminated resulting in recoupment by the employer of ten million dollars. The application of category six of ERISA § 4044 is controlling in our case, but it was not relevant to or mentioned in *Sutton*.

It is clear from the language of the statute, the general legislative history and the interpretation given to it by the Internal Revenue Service that the present plaintiffs are entitled to the early retirement benefits they seek.

In determining the amount due to each of the plaintiffs, Mead excluded from consideration early retirement benefits and reduced the amount received by each plaintiff by an amount equal to roughly five percent per year that the individual was in age short of age sixty-five. The plaintiffs, except Crotts, were entitled to have early retirement benefits considered in determining the amount of their lump sum retirement payment. The correct computation of the benefit should have been determined by reducing each plaintiff's benefit from age sixty-two, except Crotts whose benefits would be computed using age sixty-four, since Crotts would not complete thirty years of service until that age. In other words, the early retirement age benefits should be determined by figuring the actuarial reduction of five percent per year from the early retirement age of the plaintiff, rather than from age sixty-five.

We reserve the decision of the district court, and remand for further proceedings consistent with this opnion.

REVERSED AND REMANDED
WITH INSTRUCTIONS.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

Civil Action No. 84-0751

B. E. TILLEY, *et al.*,
Plaintiffs
v.

THE MEAD CORPORATION,
Defendant.

MEMORANDUM OPINION

[Filed Apr. 18, 1986]

By: James C. Turk
Chief U.S. District Judge

This case is presently before the court on cross-motions for summary judgment on the plaintiffs' claims under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*[1] The parties have submitted briefs, the court has heard oral argument, and the motions are ripe for decision.

The facts in this case are undisputed. The Pension Plan in issue is a noncontributory, defined benefit plan—one funded entirely by the employer and containing a formula setting forth the specific benefits to be received by the participants upon retirement. Under Art. V, § 2(b) of the Plan, a participant could elect early retirement without any reduction of benefits once he reached both age 62 and thirty (30) or more years of Credited Service.

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[1] By an agreed order filed February 24, 1986, the plaintiffs' common law contract claims and claims for punitive damages were dismissed.

In 1983 Mead, having decided to sell the Lynchburg Foundry Company and to terminate the Plan, gave notice to the plaintiffs that the Plan would be terminated. At the time of termination, none of the plaintiffs had reached age 62.[2] Each plaintiff received lump-sum benefits from the employer at the time the Plan was terminated. The plaintiffs have stated that this action was brought to obtain an increase in the amount or level of the lump-sum benefits.

Section 4(f) of the Plan provides:

> (f) Any surplus remanining in the Retirement Fund, due to actuarial error, after the satisfaction of all benefit rights or contingent rights accrued under the Plan (including any benefits accrued under any Pre-existing Plan), and after distribution of any released reserves as above provided, shall, subject to the pertinent provisions of federal or state law, be returnable to the respective Employing Company as determined by the Administrative Committee.

The plaintiffs argue that the early retirement provision of § 2(b) is a contingent right accrued under the Plan and must, therefore, be paid prior to any surplus being returned to the employer. The Plan's language, the legislative history, and the caselaw in the fourth circuit, however, clearly demonstrate that early retirement benefits are not "accrued benefits" under ERISA.

The Plan provided for an election of early retirement with unreduced benefits once a participant both reached age 62 and had thirty (30) years of Credited Service. Once both of these prerequisities had been met, the participant could, under Art. IV, § 2, elect in writing to exercise his early retirement option.[3] In effect, reaching age 62 and having thirty years of Credited Service were conditions which must be met before a participant could

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[2] It is also undisputed that none of the plaintiffs had reached age 62 by the time the lump-sum payments were actually paid.

[3] It is undisputed that no plaintiff made such a written election.

be said to possess even a contingent benefit of early retirement. At that point the benefit would be contingent upon the written election.

The legislative history of ERISA also supports the argument that the unreduced early retirement benefit was not a benefit accrued under the Plan. Among other things, accrued benefits under ERISA do not include the value of the right to receive early retirement benefits. *See* H.R. Conf. Report No. 1280, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code, Cong. & Ad. News 5038, 5054.

The United States Court of Appeals for the Fourth Circuit in *Sutton v. Weirton Steel Division of National Steel Corporation*, 724 F.2d 406 (4th Cir. 1983), *cert. denied* —— U.S. ——, 104 S. Ct. 2387 (1984) held that the early retirement benefits at issue were not accrued benefits and, therefore, were not nonforfeitable. The fourth circuit's reasoning in *Sutton* was followed by the third circuit in *Bencivenga v. Western Pennsylvania Teamsters*, 763 F.2d 574 (3d Cir. 1985), and *Viggiano v. Shenango China Division of Anchor Hocking Corporation*, 750 F.2d 276 (3d Cir. 1984).

The court, having carefully considered the language of the Plan, the legislative history, and the fourth circuit's opinion in *Sutton*, finds that the § 2(b) provision for unreduced early retirement benefits is not a contingent right accrued under the plan as to these plaintiffs.[4] Therefore, the plaintiffs are not entitled to any additional sums under the plan.

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[4] The court notes that Congress has amended ERISA § 204(g), 29 U.S.C. § 1054(g), to include early retirement benefits within its accrued benefits protection for plan years beginning after December 31, 1984. Retirement Equity Act, § 301(a)(2), Pub.L.No. 98-397, 98 Stat. 1450-51 (1984). The court further notes, however, that the amendment does not apply to plan years before January 1, 1985.

The plaintiffs also point to the portion of § 4(f) which states that "Any surplus remaining in the Retirement Fund, due to actuarial error, . . . shall, . . . be returnable to the respective Employing Company . . ." The plaintiffs argue that since the surplus was not the result of any actuarial error, as that term is commonly used, then the employer is not entitled to recover the surplus. The argument appears to be that if the surplus cannot be returned to the employer, it should be allocated among the participants in the plan. This argument, however, is without merit for many reasons.

Since the Plan in question was a defined benefit plan, the participants are not entitled to a share of the trust fund. Once the participant's defined benefits have been paid, any surplus from overfunding must be returned to the employer. *See Pollock v. Castrovinci*, 476 F. Supp. 606 (S.D.N.Y. 1979), *aff'd mem.*, 622 F.2d 575 (2d Cir. 1980). Two sound underlying policies support this rule. First, ERISA is designed to protect only those benefits which have become vested. *Dhayer v. Wierton Steel Division of National Steel Corporation*, 571 F. Supp. 316 (N.D. W.Va.), *aff'd* 724 F.2d 406 (4th Cir. 1983), *cert. denied* 104 S. Ct. 2387 (1984). It is not designed to provide participants with a windfall due to the employer's error in overfunding the Plan in an attempt to keep it on a sound financial basis. *In re C. D. Moyer Company Trust Fund*, 441 F. Supp. 1128 (E.D. Pa. 1977), *aff'd mem.* 582 F.2d 1273 (3d Cir. 1978). Second, the rule will serve to encourage employers to keep the funds fully funded under ERISA guidelines in that they will not be penalized for overfunding in an "abundance of caution." *Id.*

Furthermore, § 4(f) does not, as the plaintiffs contend, provide that only surplus remaining due to actuarial error is returnable to the employer. In fact, ERISA specifically provides at 29 U.S.C. § 1344(d)(1) that residual funds may revert to the employer when:

(a) the plan's liabilities to participants have been satisfied;

(b) the distribution does not contravene any provision of the law; and

(c) the plan provides for such a distribution in these circumstances.

The plaintiffs have failed to show specific facts demonstrating that these requirements have not been met.

Most fatal to the plaintiffs' argument is that the definition of "actuarial error" as it applies to ERISA cases actually includes overfunding. The Internal Revenue Service's definition states that "when fixed and contingent liabilities are discharged . . . the remaining assets may be considered surplus arising from actuarial error . . ." Rev. Rul. 83-52, 1983-1 C.B. 87.[5] The sixth circuit in *International Uunion, United Automobile, Aerospace and Agricultural Implement Workers of America v. Dyneer Corporation*, 747 F.2d 335 (6th Cir. 1984) upheld the application of the IRS definition to ERISA cases, finding that when liabilities have been discharged, the remaining pension plan assets may be considered "surplus arising from actuarial error." Indeed, a plan's overfunding may arise from actuarial error "because actual requirements differ from expected requirements," Treas. Reg. § 1.401-2(b)(1), or even because of intentional overfunding, *Bryant v. International Fruit Products Company*, 604 F. Supp. 890 (S.D. Ohio 1985). Applying the broad IRS definition in this case, the court finds that the surplus did in fact arise from actuarial error.[6] It is, therefore, returnable to the employer.

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[5] Rev. Rul. 83-52 has been modified and superseded by Rev. Rul. 85-6, 1985-1 C.B. 133 to meet the new requirements of § 301 of the Retirement Equity Act of 1984 as discussed *supra* at fn. 4.

[6] The plaintiff places much weight on the defendant's "admission" at oral argument that the surplus was not the result of actuarial error. This amounts to little more than quibbling over semantics. The defendant's statement that there were no actuarial errors made

Based on the foregoing, the court finds that the plaintiffs are not entitled to any sums in addition to the lump-sum benefits which they have already received. The court further finds that the surplus remaining in the fund is returnable to the employer pursuant to the applicable ERISA provision, 29 U.S.C. § 1344(d)(1), and § 4(f) of the Plan. Therefore, the plaintiffs' motion for summary judgment should be DENIED and the defendant's motion for summary judgment should be GRANTED. An order consistent with the memorandum opinion shall be entered this day.

DATED: This 18th day of April, 1986.

/s/ James C. Turk
Chief U.S. District Judge

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in the calculation of the plaintiffs' lump-sum benefits merely recognizes that the correct discount rate was used to calculate the benefits. The defendant did not state that there was no "actuarial error" as used as a term of art.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-3858

TILLEY

v.

THE MEAD CORPORATION

MANDATE

[Filed June 12, 1991]

The judgment of this court dated 2/26/91 takes effect today.

JOHN M. GREACEN
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-3858

B. E. TILLEY; DAVID H. WALL; WILLIAM L. CROTTS, JR.; CHRISLEY H. REED; J. C. WEDDLE; WILLIAM D. GOODE,
Plaintiffs-Appellants

v.

THE MEAD CORPORATION,
Defendant-Appellee

AMERICAN SOCIETY OF PENSION ACTUARIES; PENSION BENEFIT GUARANTY CORP,
Amici Curiae

THE AMERICAN ASSOCIATION OF RETIRED PERSONS; AMERICAN ACADEMY OF ACTUARIES AND THE AMERICAN SOCIETY OF PENSION ACTUARIES,
Amici Curiae

On Petition for Rehearing with
Suggestion for Rehearing In Banc

[Filed June 5, 1991]

The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court.

On the question of rehearing before the panel, Judge Chapman voted to rehear the case. Judge Widener and Judge Murnaghan voted to deny.

In a requested poll of the Court on the suggestion for rehearing in banc, Judge Russell, Judge Chapman, Judge Wilkinson, Judge Wilkins and Judge Niemeyer voted to rehear the case in banc; and Chief Judge Ervin, Judge Widener, Judge Hall, Judge Phillips, Judge Sprouse and Judge Murnaghan voted against in banc rehearing.

As the panel considered the petition for rehearing and is of the opinion that it should be denied, and as a majority of the active circuit judges voted to deny rehearing in banc,

IT IS ADJUDGED AND ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Murnaghan.

For the Court,

/s/ John M. Greacen
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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Amici Curiae

On Petition for Rehearing with
Suggestion for Rehearing In Banc

[Filed May 28, 1991]

The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Murnaghan with the concurrence of Judge Widener. Judge Chapman dissents.

For the Court,

/s/ John M. Greacen
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-3858

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Amici Curiae

ORDER

[Filed May 28, 1991]

Appellee, Mead Corporation, has filed a motion for leave to file reply memorandum in support of petition for rehearing and suggestion for rehearing in banc.

The Court grants the motion to file reply memorandum.

Entered at the direction of Judge Murnaghan with the concurrence of Judge Widener and Judge Chapman.

For the Court - By Direction

/s/ John M. Greacen
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-3858

B. E. TILLEY; DAVID H. WALL; WILLIAM L. CROTTS, JR.; CHRISLEY H. REED; J. C. WEDDLE; WILLIAM D. GOODE,
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Amici Curiae

THE AMERICAN ASSOCIATION OF RETIRED PERSONS; AMERICAN ACADEMY OF ACTUARIES AND THE AMERICAN SOCIETY OF PENSION ACTUARIES,
Amici Curiae

ORDER

[Filed May 30, 1991]

For reasons appearing to the Court;

The Court's order of May 28, 1991, denying appellee's petition for rehearing and suggestion for rehearing in banc is hereby withdrawn.

Entered at the direction of Judge Murnaghan.

For the Court,

/s/ John M. Greacen
Clerk

ERISA §§ 4044(a), (d)(1), 29 U.S.C. §§ 1344(a), (d)(1)

Allocation of Assets.

(a) In the case of the termination of a defined benefit the plan administrator shall allocate the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan in the following order:

(1) First, to that portion of each individual's accrued benefit which is derived from the participant's contributions to the plan which were not mandatory contributions.

(2) Second, to that portion of each individual's accrued benefit which is derived from the participant's mandatory contributions.

(3) Third, in the case of benefits payable as an annuity—

(A) in the case of the benefit of a participant or beneficiary which was in pay status as of the beginning of the 3-year period ending on the termination date of the plan, to each such benefit, based on the provisions of the plan (as in effect during the 5-year period ending on such date) under which such benefit would be the least,

(B) in the case of a participant's or beneficiary's benefit (other than a benefit described in subparagraph (A)) which would have been in pay status as of the beginning of such 3-year period if the participant had retired prior to the beginning of the 3-year period and if his benefits had commenced (in the normal form of annuity under the plan) as of the beginning of such period, to each such benefit based on the provisions of the plan (as in effect during the 5-year period ending on such date) under which such benefit would be the least.

For purposes of subparagraph (A), the lowest benefit in pay status during a 3-year period shall be considered the benefit in pay status for such period.

(4) Fourth—

(A) to all other benefits (if any) of individuals under the plan guaranteed under this title (determined without regard to section 4022(b)(5)), and

(B) to the additional benefits (if any) which would be determined under subparagraph (A) if section 4022(b)(6) did not apply.

For purposes of this paragraph, section 4021 shall be applied without regard to subsection (c) thereof.

(5) Fifth, to all other nonforfeitable benefits under the plan.

(6) Sixth, to all other benefits under the plan.

* * *

(d)(1) Any residual assets of a plan may be distributed to the employer if—

(A) all liabilities of the plan to participants and their beneficiaries have been satisfied,

(B) The distribution does not contravene any provision of law, and

(C) the plan provides for such a distribution in these circumstances.

Code § 401(a)(2), 26 U.S.C. § 401(a)(2)

Qualified Pension, Profit Sharing, and Stock Bonus Plans.

(a) Requirements for Qualification.—A trust created or organized in the United States and forming part of a stock bonus, pension, or profit sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section—

(1) if contributions are made to the trust by such employer, or employees, or both, or by another employer who is entitled to deduct his contributions under section 404(a)(3)(B) (relating to deduction for contributions to profit sharing and stock bonus plans), for the purpose of distributing to such employees or their beneficiaries the corpus and income of the fund accumulated by the trust in accordance with such plan;

(2) if under the trust instrument it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries (but this paragraph shall not be construed, in the case of a multiemployer plan, to prohibit the return of a contribution within 6 months after the plan administrator determines that the contribution was made by a mistake of fact or law (other than a mistake relating to whether the plan is described in section 401(a) or the trust which is part of such plan is exempt from taxation under section 501(a), or the return of any withdrawal liability payment determined to be an overpayment within 6 months of such determination);

Treas. Reg. § 1.401-2

Impossibility of Diversion Under the Trust Instrument.

(a) *In general.* (1) Under section 401(a)(2) a trust is not qualified unless under the trust instrument it is impossible (in the taxable year and at any time thereafter before the satisfaction of all liabilities to employees or their beneficiaries covered by the trust) for any part of the trust corpus or income to be used for, or diverted to, purposes other than for the exclusive benefit of such employees or their beneficiaries. This section does not apply to funds of the trust which are allocated to provide medical benefits described in section 401(h) as defined in paragraph (a) of § 1.401-14. For the rules prohibiting diversion of such funds and the requirement of reversion to the employer after satisfaction of all liabilities under the medical benefits account, see paragraph (c) (4) and (5) of § 1.401-14. For rules permitting reversion to the employer of amounts held in a section 415 suspense account, see § 1.401(a)-2(b).

(2) As used in section 401(a)(2), the phrase "if under the trust instrument it is impossible" means that the trust instrument must definitely and affirmatively make it impossible for the non-exempt diversion or use to occur, whether by operation or natural termination of the trust, by power of revocation or amendment, by the happening of a contingency, by collateral arrangement, or by any other means. Although it is not essential that the employer relinquish all power to modify or terminate the rights of certain employees covered by the trust, it must be impossible for the trust funds to be used or diverted for purposes other than for the exclusive benefit of his employees or their beneficiaries.

(3) As used in section 401(a)(2), the phrase "purposes other than for the exclusive benefit of his employees or their beneficiaries" includes all objects or aims not solely designed for the proper satisfaction of all liabilities to employees or their beneficiaries covered by the trust.

(b) *Meaning of "liabilities".* (1) The intent and purpose in section 401(a)(2) of the phrase "prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust" is to permit the employer to reserve the right to recover at the termination of the trust, and only at such termination, any balance remaining in the trust which is due to erroneous actuarial computations during the previous life of the trust. A balance due to an "erroneous actuarial computation" is the surplus arising because actual requirements differ from the expected requirements even though the latter were based upon previous actuarial valuations of liabilities or determinations of costs of providing pension benefits under the plan and were made by a person competent to make such determinations in accordance with reasonable assumptions as to mortality, interest, etc., and correct procedures relating to the method of funding. For example, a trust has accumulated assets of $1,000,000 at the time of liquidation, determined by acceptable actuarial procedures using reasonable assumptions as to interest, mortality, etc., as being necessary to provide the benefits in accordance with the provisions of the plan. Upon such liquidation it is found that $950,000 will satisfy all of the liabilities under the plan. The surplus of $50,000 arises, therefore, because of the difference between the amounts actuarially determined and the amounts actually required to satisfy the liabilities. This $50,000, therefore, is the amount which may be returned to the employer as the result of an erroneous actuarial computation. If, however, the surplus of $50,000 had been accumulated as a result of a change in the benefit provisions or in the eligibility requirements of the plan, the $50,000 could not revert to the employer because such surplus would not be the result of an erroneous actuarial computation.

(2) The term "liabilities" as used in section 401(a)(2) includes both fixed and contingent obligations to employees. For example, if 1,000 employees are covered by a

trust forming part of a pension plan, 300 of whom have satisfied all the requirements for a monthly pension, while the remaining 700 employees have not yet completed the required period of service, contingent obligations to such 700 employees have nevertheless arisen which constitute "liabilities" within the meaning of that term. It must be impossible for the employer (or other non employee) to recover any amounts other than such amounts as remain in the trust because of "erroneous actuarial computations" after the satisfaction of all fixed and contingent obligations. Furthermore, the trust instrument must contain a definite affirmative provision to this effect, irrespective of whether the obligations to employees have their source in the trust instrument itself, in the plan of which the trust forms a part, or in some collateral instrument or arrangement forming a part of such plan, and regardless of whether such obligations are, technically speaking, liabilities of the employer, of the trust, or of some other person forming a part of the plan or connected with it.

Rev. Rul. 83-52, 1983-1 C.B. 87

PURPOSE

The purpose of this revenue ruling is to reconsider the position in Rev. Rul. 71-152, 1971-1 C.B. 126 and restate the position in Rev. Rul. 73-55, 1973-1 C.B. 196 under current law in view of the Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. 93-406, 1974-3 C.B. 1.

ISSUE

The issue involves the determination of the amount that may be returned to an employer upon the termination of a defined benefit plan in accordance with the nondiversion requirement of section 401(a)(2) of the Internal Revenue Code.

FACTS

A defined benefit pension plan that is not a multiemployer plan described in section 414(f) of the Code was terminated. The liabilities under the plan were discharged by an immediate distribution in cash to each participant of an amount equal to the present value of the participant's total benefits (whether or not nonforfeitable). The present values were determined on a termination basis in accordance with 29 C.F.R. section 2619.26 (1981) of the regulations published by the Pension Benefit Guaranty Corporation (PBGC) under Title IV of ERISA. The assets remaining after all distributions to the participants had been made were returned to the employer.

LAW, ANALYSIS AND HOLDING

Section 401(a)(2) of the Code and section 1.401-2 of the Income Tax Regulations provide that plan funds must not be used for purposes other than the exclusive benefit of employees or their beneficiaries prior to the termination of the plan and the satisfaction of all liabilities with respect to those individuals. Section 1.401-2(b)(2) provides that the liabilities that must be satisfied include both fixed (those nonforfeitable prior to termination) and contingent (those not nonforfeitable prior to termination) liabilities. After satisfaction of those liabilities, an employer may recover any remaining funds from the plan as surplus resulting from actuarial error.

Rev. Rul. 71-152 held that if a single payment were made at termination to discharge all liabilities of the plan, the amount of the payment must be based on assumptions no less conservative than those used in determining costs during the previous life of the plan.

Title IV of ERISA authorizes the PBGC to make a determination as to whether a terminating pension plan covered by Title IV has sufficient assets to pay all guaranteed benefits provided under the plan. Regulations pub-

lished by the PBGC under 29 CFR Part 2619 provide rules for determining the present value of benefits for certain terminating plans.

For purposes of section 1.401-2(b)(2), the valuation of benefits as permitted under Title IV may be used in determining whether there is any surplus due to an actuarial error. Therefore, after cash distributions have been made to the participants in this plan in amounts equal to the present value (determined as described above) of their total benefits, any remaining assets (i.e., those resulting from actuarial error) may revert to the employer without causing a violation of the non-diversion rule of section 1.401-2 of the regulations.

Similarly, when fixed and contingent liabilities are discharged through the purchase of a contract or contracts from an insurance company which provides the benefits with respect to individuals for whom the liabilities are determined, the remaining assets may be considered surplus arising from actuarial error and revert to the employer.

This revenue ruling does not consider whether the return of assets to the employer satisfies the requirements of regulations published by the PBGC under 29 CFR Part 2618 Subpart C.

EFFECT ON OTHER DOCUMENTS

Rev. Rul. 71-152 is revoked. Rev. Rul. 73-55 is superseded because the position stated therein is restated under current law in this revenue ruling.

THE MEAD INDUSTRIAL PRODUCTS SALARIED RETIREMENT PLAN

(Revised and restated effective as of January 1, 1976)

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THE MEAD INDUSTRIAL PRODUCTS SALARIED RETIREMENT PLAN

(Revised and restated effective as of January 1, 1976)

ARTICLE I

DEFINITIONS

The following words and phrases, when used in this Plan, unless the context clearly indicates otherwise, shall have the following meanings:

Section 1. Plan. The Mead Industrial Products Salaried Retirement Plan, the terms of which are herein set forth, revised effective as of January 1, 1976, and as it may be amended from time to time. This Plan amends, and continues as so amended, the Woodward Company Salaried Employees' Retirement Income Plan, which first became effective as of January 1, 1968, and all other Pre-existing Plans.

Section 2. Effective Date. January 1, 1976.

Section 3. Pre-existing Plan. Any retirement plan or profit sharing plan of an Employing Company or a Related Employer in effect immediately prior to the Effective Date, as to any group or unit of employees.

Section 4. Corporation. The Mead Corporation, an Ohio corporation.

Section 5. Board of Directors. The Board of Directors of the Corporation.

Section 6. Employing Company. The Mead Industrial Products Division, any subsidiary, division or company affiliated with The Mead Corporation which may, from time to time, be designated as an Employing Company by the Corporate Benefits Committee, and which shall have adopted the Plan by such resolutions and certifications, by the obtaining of such consents from trustees, commit-

tees and others and by such other steps as are necessary effectively to adopt this Plan or a Pre-existing Plan.

Section 7. Related Employer. Any division, firm or corporation, other than an Employing Company, in which an Employing Company or Companies own a substantial interest and which has been determined by the Administrative Committee to be a Related Employer.

Section 8. Employee. A regular, full-time employee of an Employing Company, wherever employed, as determined by the Employing Company under its normal practices, who is not accruing Credited Service under any other retirement plan to which the Corporation makes contributions; a former employee of an Employing Company, who has been transferred to a Related Employer, unless the transferred employee shall waive his rights to future service benefits under the Plan; or a person who is on Approved Absence and who was such an employee immediately prior to such Approved Absence.

Section 9. Approved Absence. Absence of an Employee (i) authorized or approved by his Employing Company, or (ii) while in the employ of a Related Employer pursuant to transfer from an Employing Company, or (iii) during layoff or furlough while recall rights continue (as determined in accordance with the normal practices of his Employing Company); or (iv) who returns to employment within twelve (12) months of his termination of service; (v) for the period of the absence of an Employee due to service with the armed services of the United States, expiring concurrently with reemployment or with the expiration of any reemployment right provided by law, whichever is the earlier.

Section 10. Participant. An Employee who has met all of the requirements of this Plan, has become included in this Plan as provided in Article II and who continues to have rights or contingent rights to benefits payable under this Plan.

Section 11. Earnings.

(a) *For Years After December 31, 1975:*

The amounts paid by an Employing Company to an Employee, amounts paid by a Related Employer to a former Employee of an Employing Company now employed by a Related Employer and amounts paid by a Related Employer to a current Employee prior to his transfer to an Employing Company, for services, excluding:

(i) Gifts.

(ii) Credits, awards and payments under any incentive or bonus plan, except as otherwise determined by the Administrative Committee.

(iii) Deferred compensation.

(iv) Special payment authorized by the Directors.

(b) *For Years Prior to January 1, 1976:*

The basic compensation rate paid to a Participant by an Employing Company, or a Related Employer, on November 1st of the preceding plan year, excluding all payments for overtime, bonuses, and other forms of premium or special incentive pay, and Company contributions, or the contributions of any Related Employer, to this or any other employee benefit plan. However, Earnings for the purpose of determining benefits for service prior to January 1, 1968 hereunder shall mean a Participant's basic compensation rate as of January 1, 1968.

Section 12. Final-Average Earnings.

(a) *Years Prior to January 1, 1976.*

The average annual Earnings of a Participant during the five (5) consecutive calendar years in which his Earnings have been highest, selected from the last ten (10) or less years of his continuous employment as a Participant with an Employing Company or a Related Employer before January 1, 1976.

(b) *For Minimum Retirement Income.*

For purposes of determining Minimum Retirement Income under Section 3 of Article V, the average annual Earnings of a Participant during the five (5) calendar years in which his Earnings have been highest, selected from the last eleven (11) years (including his year of retirement) of his continuous employment as a Participant with an Employing Company or a Related Employer before his early or normal retirement date or date of termination of employment with a vested benefit.

(c) *Determination.*

In the event that an Employee has less than five (5) years of such continuous employment, the Final Average Earnings shall be the average of all complete calendar years. For the purposes of Section 12(a) herein, in event that a Participant has less than one full year of continuous employment, Final Average Earnings will be based on the January 1, 1976 Earnings on an annualized basis.

Section 13. Vesting Date. The date on which a Participant shall have completed at least ten (10) years of Qualifying Service.

Section 14. Credited Interest. Interest credited under the pre-existing plan and continued after the effective date pursuant to the terms of the pre-existing plan as may be determined from time to time by the Corporate Benefits Committee.

Section 15. Primary Social Security Benefit. The primary insurance amount to which a retired Employee would be entitled, if he made timely and proper application and if he did not engage in disqualifying employment under the Federal Social Security Act, as projected to the Employee's Normal Retirement date and computed as though the employee had been covered by the Federal Social Security Act throughout his service with an Employing Company.

Section 16. Totally and Permanently Disabled. Disabled as a result of demonstrable injury or disease which will permanently, continuously and wholly prevent the Participant from engaging in any occupation or performing any work for remuneration or profit; provided that this term shall not include any injury or disease which (i) was contracted, suffered or incurred while the Participant was engaged in, or resulted from his having engaged in, a criminal enterprise, or (ii) was intentionally self-inflicted, or (iii) arose out of service in the armed forces of any country, or (iv) arose as a result of or while working for an employer other than an Employing Company or a Related Employer.

Section 17. Actuary. An independent qualified actuary, who is a member of the Society of Actuaries, or a firm of independent actuaries at least one of whose actuaries is a member of the Society of Actuaries, selected by the Administrative Committee. In addition, commencing January 1, 1976, it means an Actuary enrolled under Title III, Subtitle C of the Employee Retirement Income Security Act of 1974.

Section 18. Administrative Committee. The Administrative Committee provided for in Article XI of this Plan.

Section 19. Corporate Benefits Committee. The Mead Corporate Benefits Committee provided for in Article XI of this Plan.

Section 20. Retirement Fund. The fund described in Article XII.

Section 21. Qualifying Service. All service as a regular full-time employee, which shall not have terminated as defined in Section 5 of Article III, including time on an Approved Absence.

For a full-time employee, Qualifying Service shall commence on the initial date of employment of an Employee and shall cease upon termination of employment.

For part-time or seasonal employees, Qualifying Service shall commence on the first day of the first period of twelve (12) consecutive months in which the employee accumulates 1,000 or more Hours of Service. Thereafter, the part-time or seasonal employee shall be treated as a full-time employee.

Section 22. Actuarial Equivalent. A benefit equal in value, as of the effective date of determination to the benefit for which it is substituted, the value of both such benefits being computed on the basis of actuarial assumptions, tables and factors adopted by the Administrative Committee for such use under the Plan on the recommendation of the Actuary.

Section 23. Hour of Service. Each employee will be credited with an hour of service for:

(a) Each hour for which an employee is directly or indirectly paid or entitled to payment by the employer for the performance of duties. These hours shall be credited to the employee for the computation period or periods in which the duties are performed; and

(b) Each hour for which an employee is directly or indirectly paid or entitled to payment by the employer for reasons (such as vacation, sickness or disability) other than for the performance of duties. These hours shall be credited to the employee for the computation period or periods in which payment is made or amounts payable to the employee become due; and

(c) Each hour for which back pay, irrespective of mitigation of damage, has been either awarded or agreed to by the employer. These hours shall be credited to the employee for the computation period or periods to which the award or agreement pertains rather than the computation period in which the award, agreement, or payment was made.

Section 24. Year of Service. A Year of Service shall mean any consecutive period of twelve months.

Section 25. Plan Year. The accounting year of the Corporation, that is the twelve month period ending on December 31 of each year.

ARTICLE II

CLASSES OF BENEFITS PROVIDED; ELIGIBILITY; CONDITIONS TO PARTICIPATION

Section 1. Classes of Benefits Provided. This Plan provides for the payment of:

(a) Retirement benefits to each Participant who at the time of his retirement qualifies for such benefits, as provided in Article IV;

(b) Benefits on disability to certain classes of Participants, as provided in Article VI;

(c) Benefits to certain classes of Participants on death, as provided in Article VII; and

(d) Benefits to certain classes of Participants on termination of service, as provided in Article VIII;

Section 2. Eligibility for Participation.

(a) Each Employee, who shall have been included in a Pre-existing Plan immediately before the Effective Date applicable to such Employee, shall be eligible to be included in this Plan as of such date, and shall automatically be included in this Plan as a Participant as of such date (subject to the provisions of Section 3 of this Article, and the provisions of Article V), unless within 30 days after such effective date (or such other period as shall be determined by the Administrative Committee) he shall notify his Employing Company to the effect that he elects not

to be so included. Any employee who so notifies his Employing Company shall thereafter be eligible to enter this Plan only to the extent that he meets the requirements set forth in Subsection (b) below.

(b) Each person (i) who shall be an Employee, and (ii) who shall have completed at least one year of Qualifying Service on or after the Effective Date applicable to him, shall thereupon be eligible to become a Participant, and shall continue to be eligible so long as he meets such requirements.

(c) Notwithstanding the foregoing paragraphs (a) and (b), any managerial Employee who, because of special arrangements outside of the terms of any retirement plan, shall be deemed by the Corporate Benefits Committee to be ineligible for inclusion in this Plan, shall be excluded from the Plan.

(d) An employee of an Employing Company, who was transferred from a Related Employer, shall be ineligible for inclusion in this Plan, if he continues to accrue Credited Service under the terms of any other qualified retirement plan maintained by the Related Employer.

Section 3. Conditions to Participation. Participation in this Plan by any eligible employee shall be contingent upon receipt by his Employing Company of such consents, proofs of birth, elections, beneficiary designations, and other information as shall be prescribed by the Administrative Committee. For this purpose, any such consents, proofs of birth, elections, beneficiary designations, or other documents or information, previously furnished by an Employee in connection with a Pre-existing Plan, shall be accepted by the Administrative Committee for the purpose of this Plan, if, in its judgment, they are sufficient and proper, and the rights of the Employee are not impaired thereby. Each eligible Employee shall have 30 days, or such additional time as may be determined to be appropriate, from his date of eligibility in which to elect not to become a Participant.

ARTICLE III

CREDITED SERVICE; APPROVED ABSENCE DISABILITY; TERMINATION OF SERVICE

Section 1. Continuous Employment. Continuous employment shall be deemed to be service as an Employee (including service with two or more Employing Companies and service with a Related Employer by a former Employee of an Employing Company and former service with any Related Employer by a current Employee), which shall not have terminated as defined in Section 5 of this Article III.

Section 2. Credited Service. Subject to the succeeding sections of this Article, Credited Service shall be the total number of years and completed months of Past Service and Future Service.

(a) "Past Service" shall be the continuous employment of an Employee prior to January 1, 1976 except that the Past Service of an Employee of the Murray Rubber Division shall commence upon January 1, 1968 or his entry into this Plan, whichever shall occur later.

(b) "Future Service" shall be the continuous employment of an Employee after December 31, 1975 after he becomes eligible for participation in the Plan.

Section 3. Service after Normal Retirement Date. No Qualifying, Past or Future Service shall be credited under this Plan with respect to employment after the attainment of an Employee's Normal Retirement Date.

Section 4. Approved Absence. For the purpose of this Plan, Credited Service shall be preserved during Approved Absence, but any calendar year, after the applicable effective date during the entirety of which an employee is on such Approved Absense and as to which no earnings are payable to the employee shall not be

credited for purposes of this Plan, except that any employee who is on Approved Absence because of service in the armed forces of the United States will receive Credited Service without any Earnings for the period of his service in the armed forces. The Credited Service of any Participant who transfers to a Related Employer shall be preserved only to the extent that it shall not result in any duplicate coverage, as determined in accordance with regulation of the Administrative Committee.

Section 5. Termination of Service. Subject to the provisions of Article VIII continuous employment shall be deemed to be broken, and all Credited Service previously accumulated shall be forfeited (unless otherwise determined in accordance with normal practices of the Employing Company or as provided under Section 9 of Article I and Section 6 of Article III) in the event of:

(a) Voluntary or involuntary separation (unless such separation occurs upon transfer from one Employing Company to another or to a Related Employer, or unless, in a case covered by Section 5 (b) of Article XIII, the Corporation elects to apply the provisions of that Section) or

(b) Failure to return to work on expiration of Approved Absence or discontinuance of disability.

Section 6. Reemployment. Upon the reemployment of a Participant, who was terminated without any vested benefit by an Employing Company or a Related Employer, the Participant shall receive Credited Service (a) for continuous employment prior to his termination of employment, if the period of his break in employment is less than the period of employment prior to the break or (b) for the period of the break in employment, if the Participant is reemployed within the twelve (12) month period subsequent to the date of termination of employment.

Upon the reemployment of a Participant who had terminated with a vested deferred benefit, the Participant

shall receive Credited Service for any year in which he had Earnings.

Section 7. Limitation on Past Service. No Past Service shall be credited to any Employee who has voluntarily failed to participate (or waived his right to participate) in this or a Pre-existing Plan.

ARTICLE IV

RETIREMENT

Section 1. Normal Retirement.

(a) Each Participant who retires in accordance with the provisions of this Section 1 shall thereupon become eligible to receive a normal retirement income payable in an amount as provided in Article V.

(b) The Normal Retirement Date of each Participant shall be the first day of the month coincident with or next following his sixty-fifth (65th) birthday.

(c) Each Participant who shall not have retired early shall be retired automatically on his Normal Retirement Date, except that his active employment with an Employing Company may be continued on a year-to-year or other basis at the request of the Employing Company and with the consent of the Participant and the Administrative Committee, but in no event beyond age sixty-eight (68).

Section 2. Early Retirement. After he attains age fifty-five (55) and until he attains age sixty-five (65), a Participant shall have the right to elect an Early Retirement Date by giving written notice of such Early Retirement Date at least thirty (30) days in advance to his Employing Company, and, in such event, the Participant shall receive a retirement income in an amount determined under Article V, commencing on the first day of the month coincident with or next succeeding such Early Retirement Date.

ARTICLE V

AMOUNT OF RETIREMENT INCOME; EMPLOYEE CONTRIBUTIONS

Section 1. Amount of Retirement Income.

A Participant who retires at or after his normal retirement date shall be entitled to a retirement income for life payable monthly equal to the greater of the amounts specified in Paragraphs (a) or (b) for all years prior to January 1, 1976, plus the amount specified in Paragraph (c) for all years after December 31, 1975, as follows:

(a) An annual amount equal to (i) for years prior to January 1, 1968, for each year of Credited Past Service an amount equal to .75% of the first $6,600.00 of Earnings plus an amount equal to 1.25% of Earnings in excess of $6,600.00 plus (ii) for each year of Credited Service subsequent to December 31, 1967, but prior to January 1, 1976, an amount equal to 1% of the first $6,600.00 of Earnings and an amount equal to 1.5% of Earnings in excess of $6,600.00; or

(b) An annual amount equal to the greater of (i) $60.00 multiplied by years of Credited Past Service up to a maximum of thirty-five (35) years with proportionate allowance for completed months or (ii) an annual amount which, including the Primary Social Security Benefits provided under Section 1(d) of this Article, is equal to 1.25% of Final Average Earnings as defined in Section 12(a) of Article I, as of January 1, 1976 multiplied by years of Credited Past Service, with proportionate allowance for completed months, up to a maximum of thirty-five (35) years.

(c) For years after December 31, 1975, an annual amount equal to 1¼% of total annual Earnings subsequent to December 31, 1975.

(d) The Primary Social Security Benefit applicable to a Participant under Paragraph (a) of this Section shall be determined by multiplying (i) a factor equal to one and forty-three/one hundredths percent (1.43%) times years of Credited Past Service with proportionate allowance for completed months, up to a maximum of thirty (30) years by (ii) the annual Primary Social Security Benefit to which the employee would be entitled at the date of his retirement or termination of employment.

Section 2. Early Retirement Income.

(a) A Participant who elects an Early Retirement Date shall be entitled to a retirement income for life, payable monthly, in an annual amount which is equal to the retirement income he would receive if his Early Retirement Date were his Normal Retirement Date reduced by one-twelfth (1/12) of five percent (5%) for each month by which his Early Retirement Date precedes the first day of the month coincident with or next following the date on which he attains age sixty-five (65).

(b) If a Participant with thirty (30) or more years of Credited Service elects to retire on or after he attains sixty-two (62) years of age, he shall be entitled to the Retirement Income provided under Section 1 of Article V without any reduction of benefits.

Section 3. Minimum Retirement Income.

(a) The minimum monthly retirement income payable to a Participant (in cases of normal retirement, early retirement or late retirement) shall be the greater of (i) an annual amount which, including a percentage of the Primary Social Security Benefit applicable to him as defined in paragraph (b) of this Section, shall be equal to (A) 1½% of his Final Average Earnings, as defined in Section 12(b) of

Article I, multiplied by the number of years of his Past Service with proportionate allowance for completed months, plus (B) 1-1/2% of his Final Average Earnings, as defined in Section 12(b) of Article I, multiplied by the number of years of his Future Service with proportionate allowance for completed months or (ii) an amount equal to twenty dollars ($20.00) per month plus an additional four dollars ($4.00) per month for each full year of Credited Service in excess of five (5) full years of Credited Service.

(b) The Primary Social Security Benefit applicable to a Participant under Paragraph (a) of this Section shall be determined by multiplying (i) a factor equal to a fraction the numerator of which is the total years of Credited Service of a Participant at his retirement with proportionate allowance for completed months or termination of service and the denominator of which is the greater of (A) thirty (30) years or (B) potential years of Credited Service at Normal Retirement Age with proportionate allowance for completed months times (ii) fifty percent (50%) of the Primary Social Security Benefit to which the employee would be entitled on his Normal Retirement Date, unless the employee has thirty (30) or more Years of Credited Service or was a participant in the pre-existing Murray Rubber Co. Salaried Retirement Plan and has 30 years of continuous employment after the date when he shall have completed one year of continuous employment, and has attained at least age sixty-two (62) in which case the Primary Social Security Benefit applicable to a Participant under Paragraph (a) of this Section shall be 50% of the actual, annual, reduced, early retirement Primary Social Security Benefit to which the employee would be entitled.

Section 4. Maximum Retirement Income. The maximum retirement income payable to a Participant under this Plan shall not exceed the lesser of (i) Seventy-five Thousand Dollars ($75,000) per year, or such other amount as the Secretary of Labor by appropriate regulation shall determine from time to time, (ii) Seventy-five Percent (75%) of the Participant's average compensation for the highest three consecutive calendar years during which he was a Participant, or (iii) sixty percent (60%) of his Final Average Earnings, as defined in Section 12(b) of Article I, including one-half of his Primary Social Security Benefit, as determined under Section 3(a) of this Article.

Section 5. Relationship to Retirement Income under Pre-existing Plan. The amount of retirement income determined as in Section 1 of this Article V, shall be inclusive of, and shall in no event be less than the Actuarial Equivalent of any retirement benefit, profit sharing balance or other vested cash interest of a Participant which shall have accrued to the credit of the Participant under any Pre-existing Plans in respect of service prior to becoming included in this Plan, except for former participants in the Murray Rubber Company Salariad Retirement Plan in which case the Pre-existing Plan benefits shall be in addition to the benefits under this Plan.

Section 6. Withdrawal of Contributions. A Participant who has made contributions in accordance with the provisions of this Plan may withdraw his contributions at the time of the termination of his employment and his accrued benefits, will be actuarially reduced in an amount determined under regulations issued from time to time by the Secretary of Labor.

Section 7. Increases in Social Security. The retirement income of retired Participants and their Beneficiaries and terminated employees with vested interests shall not be reduced because of any changes in benefit levels or wage levels under the Social Security Act.

ARTICLE VI

DISABILITY RETIREMENT

Section 1. Disability Retirement Income. If a Participant shall become Totally and Permanently Disabled after the Effective Date applicable to him, he shall be entitled to receive a Disability Retirement Income, payable monthly, based on his Credited Service at the time he became Totally and Permanently Disabled determined as follows:

Years of Credited Service	Monthly Disability Income
10 years or less	$60.00
11 years	66.00
12	72.00
13	78.00
14	84.00
15	90.00
16	96.00
17	102.00
18	108.00
19	114.00
or more years	120.00

Section 2. Determination of Disability. In determining whether or not a Participant is Totally and Permanently Disabled, the Administrative Committee may require such Participant to submit himself to a physical examination at any reasonable time or times by one or more physicians approved by the Administrative Committee. Refusal to submit to any such physical examination shall be deemed to constitute recovery from disability for the purposes of this Plan.

Section 3. Waiver of Disability Income.

(a) A Participant may elect not to receive the Disability Retirement Income provided under this Article. A participant making such election shall, during the effective period of the election, be ineligible to receive the Disability Retirement Income

provided under this Article and shall also be ineligible to receive any form of early retirement income under Section 2 of Article V. If a Participant who has made such an election becomes Totally Disabled he shall be treated for purposes of the Plan as though he continued throughout the period of disability to be actively employed at the same rate of earnings as that rate in effect at the time of his becoming disabled, and shall, upon attaining his normal retirement date, become eligible to receive a normal retirement income in accordance with the provisions of Section 1 of Article V. During the effective period of such election the Participant shall be eligible to make an election of the special joint and survivor annuity set forth in Section 5 of Article IX. "Totally Disabled" means continuously and wholly disabled, as determined by the Administrative Committee, provided, however, that the determination of such disability shall be fully subject to the same procedures as Section 2 of Article VI.

(b) The election described in this Section shall be made by an instrument in writing delivered to the Administrative Committee prior to the Participant's commencing to receive any form of retirement income, and may be revoked by an instrument in writing delivered to the Administrative Committee, but no election or revocation shall have any retroactive effect.

Section 4. Limitations.

(a) The Disability Retirement Income provided in this Article shall be in lieu of all other retirement income, except as expressly otherwise provided in Section 3 of Article X.

(b) In no event shall the Disability Benefit provided under this Article be payable for any period, prior to the Participant's attaining his Normal Retirement Date, in which wages or salary are payable to him from any source.

(c) The Disability Retirement Income provided under this Article shall be payable only so long as the Participant is Totally and Permanently Disabled, unless recovery from disability occurs subsequent to attainment of his Early or Normal Retirement Date, in which case such Disability Retirement Income shall continue for life.

Section 5. Relationship to Disability Income Under Pre-existing Plan. The amount of Disability Retirement Income determined as in Section 1 of this Article VI, shall be inclusive of, and shall in no event be less than the Actuarial Equivalent of any disability benefit which shall have accrued to the credit of the Participant in respect of service prior to becoming included in this Plan under any Pre-existing Plans.

ARTICLE VII

BENEFITS ON DEATH

Section 1. Death During Active Service. In the event of the death of a Participant prior to termination of service or retirement, there shall be no death benefit payable under this Plan, other than the special election of a joint and survivor annuity under Section 5 of Article IX.

Section 2. Death after Retirement or Termination of Service. In the event of the death of a Participant after his retirement or termination of his service, no death benefit shall be payable under this Plan, except as may be provided by the Participant under an optional form of retirement income.

ARTICLE VIII

BENEFITS ON TERMINATION OF SERVICE

Section 1. Vested Deferred Retirement Income. A Participant who has reached his Vesting Date, and whose service terminates for any reason other than death or retirement, shall receive a retirement income, commencing at age 65, in an amount determined on the basis of his Credited Service up to the date of his termination of employment.

Section 2. Vested Deferred Early Retirement. A Participant who is entitled to a vested deferred retirement income commencing at age 65, as provided above, may elect to receive instead a reduced retirement income of an Actuarial Equivalent value commencing at an earlier date, but no earlier than age 55.

Section 3. Pre-existing Plan Accounts. If a terminated Participant has an account under any Pre-existing Plan, his right of withdrawal of that account, if any, shall be governed by the terms of the Pre-existing Plan.

Section 4. Application. Application for Vested Deferred Retirement Income must be made to the Administrative Committee by an applicant otherwise eligible therefor not earlier than 90 days prior to the date retirement income is to commence. The monthly retirement benefit shall become payable to such employee after (i) the date retirement income is to commence, and (ii) he shall have filed a timely application for such benefit with the Administrative Committee.

ARTICLE IX

NORMAL AND OPTIONAL FORMS OF RETIREMENT INCOME

Section 1. Normal Form of Retirement Income. The normal form of retirement income payable to a Participant under this Plan shall be an annuity payable monthly for life.

Section 2. Retirement Income for Married Participant. Unless he elects otherwise by written request to the Administrative Committee prior to his Normal or Early Retirement Date, whichever is applicable, a married Participant shall receive a retirement income reduced from the normal form of retirement income. Such retirement income shall be payable during his lifetime, with a survivor's annuity to continue after his death at the rate of 50% of the reduced retirement income to his

spouse at the time benefit payments commence. The amount of the retirement income shall be determined by applying the appropriate Actuarial Equivalent factor to the normal form of retirement income. Such Actuarial Equivalent factor shall be based on the age of the Participant and his spouse.

Section 3. Optional Forms of Retirement Income. In lieu of the normal form of retirement income payable to a Participant under the terms of this Plan, such Participant may elect to receive an annuity of actuarially equivalent value in any one of the following forms:

(a) A joint and survivor annuity, in a reduced amount, to continue during the lifetime of the retired Participant, and further to continue after his death at three-quarters, two-thirds, or one-half rate (according to the election of the Participant) to a surviving spouse or other designated beneficiary, during the lifetime of such person after the death of the retired Participant;

(b) A joint and survivor annuity, in a reduced amount, to continue during the lifetime of the Participant and further to continue after his death at three-quarters, two-thirds, or one-half rate (according to the election of the Participant) to a beneficiary who is a minor lineal descendant until such person attains age 21 if such event occurs after the death of the retired Participant;

(c) A reduced annuity payable during the lifetime of the retired Participant and guaranteed to continue to the retired Participant or to a designated beneficiary or to the estate of the last to die of the retired Participant and the beneficiary, for at least 5, 10 or 15 years (according to the election of the Participant) after the retirement of the Participant regardless of whether the Participant survives such 5, 10 or 15 year period;

(d) A reduced annuity payable during the lifetime of the retired Participant plus a benefit payable on his death in an amount equal to the full actuarial value of such reduced annuity, less any retirement income payments (including any disability payments) made to the Participant prior to his death.

(e) An annuity in an Actuarial Equivalent payable in some other form, excluding all lump sum distributions, provided that such annuity is judged by the Administrative Committee to be in the best interests of the retiring Participant, and provided further that the Participant is able to comply with such requirements as may be prescribed by the Administrative Committee for the purpose of determining its action on his election.

(f) A reduced annuity payable during the lifetime of the Participant, which shall increase at the rate of Three Percent (3%) per year on the anniversary of the Participant's actual retirement.

(g) Social Security Adjustment Option: A Participant who has retired early under the provisions of Section 2 of Article IV, or an individual beneficiary under a joint and survivor annuity option who becomes entitled before becoming eligible for Social Security benefits to enter upon an annuity payable under this Plan, may elect to receive such benefit in the form of an adjusted annuity payable in a greater amount during the period before becoming eligible for Social Security benefits and a correspondingly reduced amount, actuarially determined, after becoming so eligible, so that the total income, including both the adjusted benefit payable under this Plan and the Primary Social Security Benefit to which such person shall be entitled, shall be as nearly uniform as possible both before and after becoming so eligible.

Section 4. Conditions Relative to Optional Forms of Retirement Income.

(a) (i) To become effective, an election of an optional form of retirement income (other than optional forms under Sections 3(e) and 5 of this Article) must have been made either within thirty (30) days following the Effective Date of this Plan or at least thirty (30) days before the Normal Retirement Date or earlier actual retirement of the Participant, provided that he may elect an optional form of retirement income or change his beneficiary at any time prior to his retirement if the Participant shall furnish evidence of good health satisfactory to the Administrative Committee, provided that a Participant who is retired involuntarily prior to his normal retirement date, may exercise his election of an optional form of retirement income at any time prior to his actual retirement;

(ii) To become effective, an election of an optional form of retirement income, as described in Sections 3(e) and 5 of this Article must have been made either within one year following the Effective Date of this Plan or at least one year before the Normal Retirement Date or earlier actual retirement of the Participant, subject to the additional provisions of Paragraph (i) of this Section 4(a).

(b) Any beneficiary designated under this Article must be a natural person.

(c) To elect a joint and survivor annuity (or to change the beneficiary) a Participant shall designate his beneficiary on a form provided for the purpose, and shall furnish to the Administrative Committee not later than the date on which he shall retire, proof satisfactory to the Administrative Committee of the age of the beneficiary.

(d) The election of an optional form of retirement income shall become effective at his Normal Re-

tirement Date (regardless of whether the Participant continues in active employment after such date), or upon his earlier actual retirement.

(e) A Participant may, in hardship cases subject to the consent of the Administrative Committee, revoke his election of an optional form of retirement income at any time before it shall have become effective as provided in Subsection (d) above.

(f) If a Participant shall have elected an optional form of benefit which provides for designation of a beneficiary and

(i) If his beneficiary shall die before the election becomes effective, the election shall thereupon become void;

(ii) If the Participant shall die before the election becames effective, the election shall thereupon become void and the beneficiary shall not be entitled to an annuity under such option;

(iii) If the Participant shall remain in the active service of an Employing Company or become reemployed by an Employing Company after the date upon which the election becomes effective, his election shall nevertheless continue to be effective, and if the Participant shall die before retiring, his beneficiary shall receive the amount of annuity which would be payable to such beneficiary in accordance with such eleciton, as if such Participant had retired on the date of his death, and if the beneficiary shall die before the Participant shall actually retire, such Participant shall be entitled, after retiring, to receive only the reduced annuity payable to him in accordance with such election;

(iv) If the beneficiary shall die after commencement of the optional annuity, but before the death of the retired Participant, such Par-

ticipant shall continue to receive the reduced annuity payable to him in accordance with such election.

(g) In the election of any optional form of retirement income, the Participant may designate any person or persons, natural or corporate, as trustee or otherwise, as a payee beneficiary, to receive payments of benefits in lieu of payment to the natural person designated as beneficiary.

Section 5. Special Joint and Survivor Annuity. A special election of joint and survivor annuity may be made, as set forth in this paragraph. If such a special election of a joint and survivor annuity shall have been made by a Participant at least one year before his death and he shall die after attainment of age 55 and before attainment of Normal Retirement Date or earlier termination of his employment, for the purpose of this paragraph alone he shall be deemed to have retired early as of the first day of the month coincident with or immediately prior to the date of his death. The election of the joint and survivor annuity shall thereupon become effective and his beneficiary shall be entitled to receive an income based upon the actuarially reduced income to which the Participant would have been entitled upon such early retirement, further reduced in recognition of the substitution of a joint and survivor annuity for an annuity based on the life of the Participant only and further reduced by the cost of the coverage under this Section 5 as provided herein. In the event that a Participant who has made such a special election survives until he retires (whether or not his beneficiary dies before he retires), the retirement income subsquently payable to him shall be reduced actuarially in consideration of the coverage which he shall have received under this provision as follows:

Proportion of Reduced Retirement Income to be Paid to Beneficiary Under Option Elected	Percentage Reduction in Retirement Income of Participant for Each Full Year of Coverage (with Pro Rata Reduction for Completed Months)
½	½ of 1%
⅔	⅔ of 1%
¾	¾ of 1%

This election will be given effect prior to the completion of the one (1) year election period if: (a) Participant dies from accidental causes; (b) a failure to give effect to the election would deprive the survivor of the Participant of an annuity; (c) the election was made before the accident, and (d) the Participant at the time of the accident had arrived at his Early Retirement Date.

ARTICLE X

PAYMENT OF BENEFITS; CLAIMS PROCEDURE

Section 1. Authorization of Payment; Application; Appellate Procedure.

(a) No payments shall be made under this Plan until it shall have been authorized by the Administrative Committee.

(b) All claims for benefits shall be in writing, signed by the Participant or, if applicable, his beneficiary and filed with the Administrative Committee, through a local Plan Representative as appropriate, on forms furnished and approved by the Administrative Committee. The Administrative Committee and the Plan Representative shall follow the following procedure in processing claims:

(i) Advise the Claimant of all his rights under the Plan and assist him in the preparation of the claim;

(ii) If filed through a Plan Representative, the Plan Representative shall forward the exe-

cuted claim within thirty (30) days of receipt of the initial application to the Administrative Committee for its consideration.

(iii) The Administrative Committee shall meet monthly to consider and take action on all claims received since it last met;

(iv) Upon approval of a claim by the Administrative Committee, a member of the Committee shall take prompt action to commence payment of benefits to the Claimant in accordance with the provisions of the Plan.

(c) In the event that any claim is denied by the Administrative Committee, the claimant shall have the right within a period of sixty (60) days from the receipt of notice of denial to appeal such denial to a Panel of three persons, designated by The Corporate Benefits Committee to hear the appeal within sixty (60) days after the date the appeal was filed. The appeal shall be filed in writing with the Administrative Committee.

The Claimant shall be entitled to appear before the Panel in person to present his claim and the Panel shall have the authority to obtain such additional evidence as it deems appropriate under the circumstances to enable it to render a decision.

The decision of the Hearing Panel shall be rendered in writing to the Claimant within seven (7) days of the completion of the hearing and shall be binding upon the Company and the Claimant to the extent permitted by law.

Section 2. Date and Duration of Payment. The retirement income payable under this Plan to a retired Participant shall commence, if he shall then be living, and if in accordance with the provisions of this Plan, as of the first day of the month coincident with or next following the latest of:

(i) The actual retirement date of the Participant, or

(ii) The date on which he shall have filed an application for a retirement income with his Employing Company, or

(iii) The date specified in such application as the date upon which such income shall commence,

and shall be payable to the retired Participant on the first day of each month thereafter during his lifetime provided that any payments under this Section will commence no later than sixty (60) days after the close of the Plan Year in which the following occur, whichever is later:

(i) Participant attains Age 65 or Normal Retirement Age;

(ii) Tenth Anniversary of year in which Participant commenced participation;

(iii) Participant terminates service.

Section 3. Reemployment of a Retired Participant.

(a) Any retirement income payable under this Plan to any retired Participant shall cease no later than the first date of his reemployment by an Employing Company or a Related Employer and shall resume as of the first day of the month coincident with or next following his subsequent retirement, in the amount provided for below.

(b) Upon the reemployment of a retired Participant prior to his attainment of Normal Retirement Date, he shall be eligible to re-enter this Plan.

(c) In any case where the payment of an early retirement income ceases due to reemployment, the amount of the retirement income to be paid on subsequent retirement shall be actuarilly determined, as applicable, on the basis of the increased service, age, contributions (if any), amount of retirement income

paid, and any other factors which are relevant to such a determination.

Section 4. Limitation Regarding Small Payments. In the event that the present value of any retirement income or other benefit provided under this Plan is an amount less than one thousand seven hundred and fifty dollars ($1,750.00), present value may be paid in a lump sum in full discharge of all liability in respect of such retirement income or other benefit under the Plan.

Section 5. Payment to Incompetents. Until the Administrative Committee shall have received written notice that any person entitled to receive any benefit under this Plan is a minor, or is otherwise incompetent, it may authorize payment of such benefit directly to such person, and all liability for the payment thereof shall be discharged upon such payment. If, after receipt of such written notice as to any such person, the Administrative Committee shall receive evidence satisfactory to it that another person or an institution is then maintaining or has custody of such person, and that no guardian, committee or other legal representative of the estate of such person shall have been duly appointed, the Administrative Committee may authorize payment of such benefit to such other person or institution, and the release of such other person or institution shall be a valid and complete discharge for the payment so made.

Section 6. Misstatement in Application for Retirement Income. If any Employee in his application to participate in the Plan or for a retirement income, or in response to any request of his Employing Company or Related Employer for information, makes any statement which is erroneous or omits any material fact or fails before receiving his first payment to correct any information that he previously incorrectly furnished to the Employing Company for its records, his contributions (if any) and the amount of his retirement income shall be adjusted on the basis of the facts, and the amount of any overpayment theretofore made to such Participant shall be

deducted from his next succeeding payments as the Administrative Committee shall direct.

Section 7. Missing Persons. If the Administrative Committee is unable, within five years after any benefit becomes due from the Retirement Fund to a Participant or beneficiary, to authorize payment because the identity or whereabouts of such persons cannot be ascertained, the Administrative Committee may direct that such benefit (which benefit shall in no event be less than the accrued retirement income, if any, earned by the Participant) and all further benefits with respect to such person shall be forfeited, and all liability for the payment thereof shall terminate, provided however, that, in such event, a death benefit shall be paid to the beneficiary or estate of the Participant, as provided for in Article VII, in all respects as though the death of the Participant had occurred on the date when the benefit referred to above would otherwise have been payable.

ARTICLE XI

FIDUCIARY RESPONSIBILITY

The following persons are hereby designated as fiduciaries under the Plan with the respective powers and duties allocated to them:

Section 1.—Plan Administrator.

(a) *Designation.* This Plan shall be administered by an Administrative Committee, which shall be the Plan Administrator, and which shall consist of not less than three persons who shall be appointed from time to time by The Corporate Benefits Committee. Members of the Administrative Committee may participate in the benefits under the Plan provided they are otherwise eligible to do so. Except as otherwise provided by The Corporate Benefits Committee, no member of the Administrative Committee shall re-

ceive any compensation from the Retirement Fund for his services as such.

(b) *Powers and Duties of the Administrative Committee.* The Administrative Committee shall have the following powers and duties:

(i) To establish and enforce such rules, regulations and procedures as it shall deem necessary or proper for the efficient administration of the Plan;

(ii) To interpret the Plan, including the supplying of any omissions in accordance with the intent of the Plan, its interpretation thereof in good faith to be final and conclusive upon all persons;

(iii) To decide all questions concerning the Plan and the eligibility of any Employee to become a Participant;

(iv) To compute the amount of benefits which shall be payable to any Participant, retired Participant, or beneficiary in accordance with the provisions of the Plan, and to determine the person or persons to whom such benefits shall be paid;

(v) To authorize or deny the payment of benefits;

(vi) To supervise and direct work of Corporation Personnel and Plan Representatives, in the administration of the Plan including without limitation the following duties:

(A) To prepare and file all reports with Government agencies;

(B) To prepare and distribute booklets, announcements, reports and descriptions of the Plan to employees, as shall be required by law;

(C) To maintain all records relating to the Plan and Trust Fund;

(D) To establish and administer at a local level a uniform claims procedure;

(E) To perform such other duties as shall be necessary to administer the Plan.

(vii) To review and approve the employment of all accountants, actuaries, consultants and attorneys as shall be deemed necessary from time to time, and to receive and evaluate their reports;

(viii) To review bonding and insurance requirements; and

(ix) To delegate in its discretion its powers and duties to administer the Plan to personnel of the Corporation.

provided, however, that the discretion vested in the Administrative Committee shall in all cases be exercised in a manner which is, so far as may be practicable, consistent and uniform as to all Employees similarly situated.

Section 2. Corporate Benefits Committee.

(a) *Designation.* The Corporate Benefits Committee shall be designated from time to time by the Directors and shall consist of not less than five (5) members. Members of the Corporate Benefits Committee may participate in the benefits under the Plan provided they are otherwise eligible to do so. Except as otherwise provided by the Directors, no member of the Corporate Benefits Committee shall receive any compensation from the Retirement Fund for his services as such.

(b) *Powers and Duties.* The Corporate Benefits Committee shall have the following powers and duties:

(i) To terminate the Plan and/or Trust or discontinue contributions;

(ii) To amend or modify the Plan or Trust in whole or in part;

(iii) To appoint Trustees and other Fiduciaries and designate members of the Administrative Committee;

(iv) To determine the amount of contributions necessary to fund the Plan on an actuarially sound basis and to collect and pay all contributions to the Retirement Fund in a timely manner;

(v) To delegate to employees of the Corporation or to the Plan Administrator such additional powers and duties as it shall consider necessary or desirable in the operation of the Plan and Retirement Fund;

(vi) To review periodically all aspects of the Administration of the Plan.

Section 3. Investment Policy Committee.

(a) *Designation.* A Retirement Plan Investment Policy Committee of not less than five (5) persons shall be designated annually by the Corporate Benefits Committee to review the investment of assets in the Trust(s). Members of the Investment Policy Committee may participate in the benefits under the Plan provided they are otherwise eligible to do so. Except as otherwise provided by the Corporate Benefits Committee, no member of the Investment Policy Committee shall receive any compensation from the Retirement Fund for his services as such.

(b) *Powers and Duties.* The Investment Policy Committee shall have the following duties and powers:

(i) To develop investment policies and procedures, implement investment programs and monitor designated Trustee and Investment Advisor activities;

(ii) To employ and discharge Investment Advisors and to recommend the selection and/or termination of Trustees or Insurance Companies;

(iii) To receive and evaluate monthly, quarterly and annual reports of the Trustees and Investment Advisors;

(iv) To review investments made by the Trustees and Investment Advisors and other investments held by the Plan(s);

(v) To direct the flow of funds between trusts and allocate the amount of assets to be managed by each Trustee and Investment Advisor;

(vi) To report investment performance to the Corporate Benefits Committee at least once each quarter;

(vii) To supervise and coordinate when so directed by The Corporate Benefits Committee the investment policy for the funds of Pension Plans other than The Mead Industrial Products Salaried Retirement Plan.

Section 4. Trustees.

(a) *Designation.* The Trustees of any Trust Funds under the Plan shall be designated by the Corporate Benefits Committee.

(b) *Duties and Powers.* The Trustees shall have such duties and powers as are set forth in the Trust Agreement executed by the Company and the Trustee to fund benefits under this Plan.

ARTICLE XII

RETIREMENT FUND

Section 1. Retirement Fund.

(a) The Corporation shall maintain a Retirement Fund into which shall be paid the contributions of each Employing Company participating in the Plan and, to the extent there are any, the contributions of each Participant. The Retirement Fund may comprise either a trust fund or trust funds held by a trustee or trustees, a group annuity contract or contracts, including a deposit administration contract or contracts, or any combination thereof.

The contributions of each Employing Company shall be paid at such times, in such amounts, and in such manner as the Corporate Benefits Committee shall determine and as may be necessary to keep the Retirement Fund actuarially sound.

At no time prior to the satisfaction of all liabilities under the Plan with respect to Participants, retired Participants, and beneficiaries, shall any part of the corpus or income of the Retirement Fund be used for, or diverted to, any purpose other than for their exclusive benefit. No person shall have any financial interest in or right to the Retirement Fund or any part thereof, except as expressly provided for in this Plan.

(b) Each Participant or retired Participant or other person who shall claim the right to any payment under the Plan shall be entitled to look only to the Retirement Fund for such payment. No liability for the payment of benefits under the Plan shall be imposed upon the Board of Directors, the Administrative Committee, the Corporate Benefits Committee, the Investment Policy Committee, the Trustees,

the Corporation, an Employing Company or the officers, directors or stockholders of the Corporation.

(c) Forfeitures shall be applied to reduce future contributions to the Retirement Fund and shall not be allocated to increase any benefits of employees.

Section 2. Annual Actuarial Examination. At least once each year, the Corporation shall cause the liabilities of the Plan in respect of retirement incomes and other benefits to be evaluated by an Actuary who shall report to the Corporation as to:

(a) The soundness and solvency of the Retirement Fund in relation to such liabilities;

(b) The amount of the annual contribution by an Employing Company which would be sufficient to provide for currently accruing retirement income and other benefit liabilities; and

(c) The applicable limitations established by law as to the maximum and minimum amount of the contributions (with respect to both past and currently accruing benefits) which may be deducted for federal income tax purposes. An Actuary shall determine, and certify to the Administrative Committee, all actuarial computations necessary to the proper administration of this Plan.

Section 3. Separate Accounts. The Administrative Committee shall maintain, or cause to be maintained, a separate account for each Employing Company participating in the plan showing the value of its contributions to, the value of any funds of a Pre-existing Plan covering its employees included in, its share of earnings or losses in, and payments allocable to its employees from, the Retirement Fund and each separate part of the Retirement Fund.

ARTICLE XIII

MISCELLANEOUS PROVISIONS

Section 1. Non-Alienation of Benefits. No benefit which shall be payable under this Plan shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, garnishment, encumbrance, or charge by a Participant or a beneficiary or anyone claiming under either of them. If a Participant or a beneficiary or anyone claiming under either of them shall attempt to or shall subject in any manner any benefit which shall be payable under this Plan to anticipation, alienation, sale, transfer, assignment, pledge, garnishment, encumbrance, or charge, his interest in any such benefit shall terminate and the Administrative Committee shall instruct the trustee to hold or apply it to or for the benefit of such person, his spouse, children "or other dependents", or any of them as the Administrative Committee may instruct.

Section 2. Plan Not a Contract of Employment. This Plan shall not be deemed to constitute a contract between any Employee and an Employing Company, or to be a consideration for the employment of any Employee. Nothing in this Plan shall give any Employee the right to be retained in the employ of an Employing Company; all Employees shall remain subject to discharge, discipline or layoff to the same extent as if the Plan had not been put into effect.

Section 3. Limitation Concerning Twenty-five Highest Paid Employees as Required by U.S. Treasury Regulations.

(a) In the event that either this Plan shall be terminated or the full current cost of this Plan shall have not been met during the 10-year period following its Effective Date, then, anything contained in this Plan to the contrary notwithstanding, except as provided by this Section, the following limitations

shall apply to the part of the Retirement Fund contributed by the Employing Companies which may be used for the benefit of any person who on the Effective Date of this Plan shall have been among the twenty-five highest paid Employees, and whose anticipated annual retirement income payable under the Plan on normal retirement exceeds $1,500. Such part shall not exceed the greatest of: (i) $20,000; or (ii) an amount equal to the contributions by the Employing Companies (or the part of the Retirement Fund attributable thereto) which would have been applied to provide benefits for such person if the Pre-existing Plans had been continued without change; or (iii) the sum of (A) an amount equal to the contributions by the Employing Companies (or the part of the Retirement Fund attributable thereto) which would have been applied to provide benefits for such person under the Pre-existing Plans if they had been terminated on the day before the effective date of this revised plan, and (B) an amount equal to 20% of the employee's average regular annual compensation, but not in excess of $10,000, multiplied by the number of years since the Effective date.

(b) If the full current cost of this Plan shall at any time during the 10-year period following its Effective Date not have been met, but the Plan shall not have been terminated, the limited amount of current monthly retirement income allowable to any person under Subsection (a) of this Section 3 shall be increased to the extent necessary to provide the full monthly retirement income otherwise allowable under the Plan, provided, however, that the aggregate of such additional monthly payments in the year then current to all such persons does not exceed the aggregate contributions of the Employing Companies already made under the Plan in the year then current. If the aggregate of such contributions would

be so exceeded, the additional payments to which any person would otherwise be entitled shall be reduced in the proportion that the aggregate of such contributions bears to the aggregate of such additional payments.

(c) If the retirement income of any person shall have been suspended in part in accordance with Subsection (a) of this Section 3 because the full current costs of the Plan shall not then have been met, and if the full current costs thereafter shall have been met, the full amount of the retirement income payable to him shall be resumed and the part of any income which shall have been suspended shall then be paid in full.

(d) In the event that it shall be determined by statute, court decision, ruling by the Internal Revenue Service, or otherwise, that the provisions of this Section 3 are no longer necessary to qualify the Plan under the Internal Revenue Code, this Section 3 shall be ineffective without amendment to the Plan.

Section 4. Modification or Discontinuance of the Plan.

(a) The Corporation expects and intends to maintain this Plan in force indefinitely, but necessarily reserves the right to amend or discontinue the Plan in whole or in part at any time.

(b) At any time and from time to time, the Plan may be amended in whole or in part, or the contributions of an Employing Company may be suspended; provided, however, that no amendment shall be effective unless the Plan as so amended shall, prior to the satisfaction of all liabilities with respect to Participants, retired Participants, and beneficiaries under this Plan, be for the exclusive benefit of such persons.

(c) In case of the complete termination of the Plan (or partial termination as determined by the

United States Department of the Treasury) the assets of the Plan available to provide benefits shall be allocated among Participants and Beneficiaries in the following order:

(i) First, to that portion of each individual's accrued benefit which is derived from the Participant's contributions to the Plan or any vested interests from prior plans.

(ii) Second, in the case of benefits payable as an annuity—

(A) In the case of the benefit of a Participant or Beneficiary which was in pay status as of the beginning of the three-year period ending on the termination date of the Plan, to each such benefit, based on the provisions of the Plan (as in effect during the five-year period ending on such date) under which such benefit would be the least, the lowest benefit in pay status during such three-year period being considered the benefit in pay status for such period, and

(B) In the case of a Participant's or Beneficiary's benefit (other than a benefit described in Subparagraph (A)) which would have been in pay status as of the beginning of the three-year period; and if his benefits had commenced (in the normal form of annuity under the Plan) as of the beginning of such period, to each such benefit based on the provisions of the Plan (as in effect during the five-year period ending on such date) under which such benefit would be the least.

(iii) Third—

(A) To all other benefits (if any) of individuals under the Plan, guaranteed under

Title IV of the Employment Retirement Income Security Act of 1974 determined without regard to Section 4022(b)(5), and

(B) To the additional benefits (if any) which would be determined under Subparagraph (A) next preceding if Section 4022 (b)(6) of the Act did not apply; and

applying Section 4021 of the Act for the purposes of this paragraph without regard to Subsection C thereof.

(iv) Fourth—To all other nonforfeitable benefits under the Plan.

(v) Fifth—To all other benefits under the Plan.

(d) For the purposes of Article XIII, Section 4(c):

(i) The amount allocated under any paragraph with respect to any benefit shall be properly adjusted for any allocation of assets with respect to that benefit under a prior paragraph.

(ii) If the assets available for allocation under any paragraph of Article XIII, Section 4(c) are insufficient to satisfy in full the benefits of all individuals which are described in that paragraph, the assets shall be allocated prorata among such individuals on the basis of the present value (as of the termination date) of their respective benefits described in that paragraph.

(e) If the Plan is discontinued but the Corporate Benefits Committee further determines that the trust agreement shall be continued pursuant to its terms and the provisions of this Section, no further contributions will thereafter be made by either the Participants or the Employing Companies, but the trust

agreement shall be administered otherwise as though the Plan were in full force and effect, except that no further benefits will accrue after the date of discontinuance. If the trust agreement is subsequently terminated, the trust assets shall then be allocated and distributed in accordance with the procedure set forth in Subsection (c) above.

(f) Any surplus remaining in the Retirement Fund, due to actuarial error, after the satisfaction of all benefit rights or contingent rights accrued under the Plan (including any benefits accrued under any Pre-existing Plan), and after distribution of any released reserves as above provided, shall, subject to the pertinent provisions of federal or state law, be returnable to the respective Employing Company as determined by the Administrative Committee.

(g) If this Plan is terminated as to some (but not all) Participants, then the Corporation shall cause the part of the Retirement Fund which is allocable (as determined by the Administrative Committee upon the advice of the Actuary) to such Participants and their beneficiaries to be segregated, and the assets so segregated shall be applied for such Participants and beneficiaries as provided in paragraphs (c), (d) and (e) of this Section.

(h) Upon the complete discontinuance of contributions hereunder or upon complete termination of the Plan (or partial termination of the Plan as determined by the United States Department of the Treasury) the rights of each Participant (involved in the termination) to benefits accrued to the date of such termination or discontinuance, to the extent then funded, or the rights of each employee to the amounts credited to this account at such time, are nonforfeitable.

Section 5. Effect of Corporate Reorganization, etc.

(a) In the event that the Employing Company shall become a party to any reorganization, merger, consolidation or other corporate readjustment, or shall be dissolved or liquidated, and, as a result thereof, a substantial part of the Employees of the Employing Company shall become the Employees of another corporation, then this Plan shall not be terminated or discontinued in whole or in part as to such Employing Company, and such other corporation or corporations shall, in all respects, be substituted for such Employing Company under this Plan.

(b) In the event that any entity other than the Corporation shall acquire a majority of the outstanding voting stock of the Corporation, or all or substantially all of the assets of the Corporation, or any plant, division or department thereof as a going concern, then, the Corporation, as determined by the Corporate Benefits Committee, may, in lieu of the normal operation of Article VIII or Section 4 of this Article, cause any part of the Retirement Fund which is allocable (as determined by the Administrative Committee upon the advice of the actuary) to Participants who thereupon become employed (directly or indirectly) by the acquirer and the beneficiaries of such Participants, to be segregated and deposited in a separate fund, which shall thereafter be held subject to this Plan and in such event the acquirer shall be vested with all of the powers vested in the Board of Directors with respect to this Plan as it relates to the acquirer's employees. In such case, this Plan shall not be terminated or discontinued in whole or in part. Alternatively, the Corporate Benefits Committee may terminate this Plan as to such acquired corporation, plant, division or department, in which case the allocable part of the Retirement Fund shall be segregated as provided above and applied as provided in Section 4 of this Article.

(c) In the event that any Employing Company shall be involved in a merger, consolidation, acquisition, reorganization, liquidation, transfer of assets to another Plan or similar transaction, the accrued benefits earned by a Participant prior to the transaction shall not be reduced and shall be equal to or greater than the benefit to which he would have been entitled to receive before the transaction.

Section 6. Effect of Bargaining Agreements. In the event that a bargaining representative of any Participant negotiates an agreement for another retirement plan as to such Participant, such Participant shall, upon his inclusion in such Plan, be deemed to have terminated his service under this Plan.

ARTICLE XIV

PRE-EXISTING PLANS

RESERVED.

ARTICLE XV

GENERAL PROVISIONS

Section 1. Word Headings. The word headings of the sections and paragraphs of this Plan are supplied solely for the purpose of facilitating reference to such sections and paragraphs and shall not, in any way, alter, amend, supplement, subtract from or otherwise change this Plan or any part thereof.

Section 2. Gender and Number. Where applicable, "he", "his", and "him" shall include "she", "hers" and "her", and references in the singular shall include the plural references.

Section 3. Ohio Plan. This Plan shall be construed and enforced according to the laws of the State of Ohio and all provisions shall be administered according to the laws of that State.

Section 4. Separability. Each provision hereof shall be independent of each other provision, and if any provision of this Plan proves to be, or is held by any Court or tribunal, board or authority of competent jurisdiction to be illegal, unenforceable or in conflict with any of the provisions of Section 401 of the Internal Revenue Code, as amended, any other provision of law or the rules and regulations of the Commissioner of Internal Revenue or of the Secretary of the Treasury with respect to qualification of the Plan created herein as a tax-free retirement plan or with respect to deduction of the Corporation's contribution to the Plan in computing its net income for federal tax purposes, such provision shall be disregarded and shall be deemed to be null and void and no part of this Plan, but such invalidation of any such violative provisions shall not otherwise impair or affect this Plan or any of its other provisions provided however, that nothing in this paragraph shall be treated or interpreted so as to work a reversion or diversion of any funds to the Corporation.

IN WITNESS WHEREOF, the undersigned have executed this Plan on this 28th day of December, 1977.

ATTEST:

THE MEAD CORPORATION

/s/ Gordon H. Kettering
Vice President

/s/ [Illegible]
Asst. Secretary

FIRST AMENDMENT
TO
THE MEAD INDUSTRIAL PRODUCTS SALARIED RETIREMENT PLAN
(January 1, 1976 Restatement)

WHEREAS, The Mead Industrial Products Salaried Retirement Plan was established for the benefit of eligible employees; and

WHEREAS, such Plan has been amended on prior occasions, including a complete restatement effective as of January 1, 1976 (the "Plan"), which separately sets forth the provisions of such Plan; and

WHEREAS, it is desirable to amend the Plan;

NOW, THEREFORE, effective as of January 1, 1976, but with respect only to those employees who retire, die or otherwise terminate their employment on or after January 1, 1976, the Plan hereby is amended in the respects herein provided.

1. Section 23 of Article I of the Plan hereby is amended to provide as follows:

> *Section 23. Hour of Service.* An "hour of service" with respect to any Employee means an hour of service which shall be credited to him for purposes of the Plan for:
>
> (a) each hour for which he is directly or indirectly paid, or entitled to payment, by his Employing Company for the performance of duties as an Employee; provided, however, that hours paid at a premium rate shall be treated as straight-time hours. These hours shall be credited to the Employee for the computation period or periods in which the duties are performed; and
>
> (b) each hour for which he is directly or indirectly paid, or entitled to payment, by his Employing Com-

pany on account of a period of time during which no duties as an Employee are performed (irrespective of whether he remains an Employee) due to vacation, holiday, illness, incapacity (including disability), lay-off, jury duty, military duty, or leave of absence, up to a maximum of eight hours per day and 40 hours per week; provided, however, that no more than 501 hours of service shall be credited to an Employee on account of any single continuous period during which he performs no duties (whether or not such period occurs in a single Plan Year); provided, further, that no hours of service shall be credited for payment which is made or due under a program maintained solely for the purpose of complying with applicable Workmen's Compensation, unemployment compensation, or disability insurance laws; and provided, further, that no hours of service shall be credited to an Employee for payment which is made or due solely as reimbursement for medical or medically related expenses incurred by him. These hours shall be credited to the Employee for the computation period or periods in which the period during which no duties are performed occurs, or if the period during which no duties are performed extends beyond one computation period, such hours shall be allocated between not more than the first two computation periods on any reasonable basis which is consistently applied with respect to all employees within the same reasonably defined job classification.

(c) each hour for which back pay, irrespective of mitigation of damages, is either awarded or agreed to by his Employing Company; provided, however, that the crediting of hours of service for back pay awarded or agreed to with respect to periods of employment or absence from employment described in any other subparagraph of this Section 23 shall be subject to the limitations set forth therein. These hours shall be credited to the Employee for the com-

putation period or periods to which the award or agreement pertains rather than to the computation period in which the award, agreement, or payment was made; and

(d) each hour for which he would have been scheduled to work for his Employing Company during the period of time that he is on Approved Absence, up to a maximum of eight hours per day and 40 hours per week; provided, however, that hours of service credited under this paragraph (d) when added to hours of service credited under paragraph (b) or (c), if any, by reason of such absence, shall not exceed a total of 1,000 hours of service for any one computation period. Notwithstanding anything to the contrary contained in this Section 23, no more than one hour of service shall be credited to an Employee for any one hour of his employment or absence from employment. The rules set forth in paragraphs (b) and (c) of Department of Labor Regulation 2530.200b-2, related to special rules for determining hours of service for reasons other than the performance of duties and the crediting of hours of service to computation periods, to the extent not provided hereunder, hereby are incorporated by reference, pursuant to Department of Labor Regulation § 2530.200b-2(f).

2. Section 1 of Article IV of the Plan hereby is amended to provide as follows:

Section 1. Normal Rctirement. Each Participant who retires hereunder on or after his Normal Retirement Date shall be eligible for a normal retirement benefit in an amount computed in accordance with the provisions of Article V; provided, however, that the interest of each such Participant shall become fully vested and nonforfeitable upon attainment of age 65. Prior to January 1, 1979, no Participant may continue in employment with an Employing

Company after his Normal Retirement Date, except with the express consent of such Participant and the Administrative Committee and then not beyond age 68; provided, however, that prior to the earlier of (i) the expiration date of any applicable collective bargaining agreement in effect for a Participant on September 1, 1977, or (ii) January 1, 1980, no Participant who is covered by such a bargaining agreement may continue in employment with an Employing Company after his Normal Retirement Date, except with the express consent of such Participant and the Administrative Committee and then not beyond age 68. Except as otherwise provided by applicable State law, in no event may an Employee continue in employment with the Corporation, an Employing Company or any Related Employer beyond age 70.

3. Section 1(d) of Article V of the Plan hereby is amended to provide as follows:

(d) The Primary Social Security Benefit applicable to a Participant under (a) shall be determined by multiplying (i) a factor equal to 1.43% times his years of Credited Past Service with proportionate allowance for completed months, up to a maximum of 35 years, by (ii) the annual Primary Social Security Benefit to which the employee would be entitled at his Normal Retirement Date or earlier date of termination of employment.

4. Section 4 of Article V of the Plan hereby is amended to provide as follows:

Section 4. Maximum Retirement Benefit. The maximum aggregate projected annual retirement benefit which may be paid to a Participant under the Plan and any other qualified employee pension benefit plan maintained by an employer (as defined in Article XVI) at any time within a limitation year may not exceed the lesser of (i) 60% of his Final Average

Earnings, as defined in Section 12(b) of Article I, including one-half of his Primary Social Security Benefit, as determined under Section 3(a) of this Article V, or (ii) the limitation provided in Article XVI.

5. Section 2 of Article IX of the Plan hereby is amended to provide as follows:

Section 2. Automatic Election For Married Participant. A Participant

(a) who is eligible to receive a normal, early, disability, or vested deferred retirement benefit under Article IV, VI, or VIII; who has attained age 55; and who is married on the date payment of such benefit commences; or

(b) who dies (i) after retirement under conditions of eligibility for a normal or early retirement benefit under Article IV but prior to the commencement of benefit payments, or (ii) after his 65th birthday but before his retirement or other termination of employment; and who is married on the date of his death;

shall be deemed to have elected the qualified joint and survivor annuity, described as the option provided in Section 3(a) except that the effective rate shall be only a rate of one-half, and to have designated his spouse on such date as his beneficiary thereunder, unless prior to such date he either (i) has elected an optional method of payment under Section 3 of this Article IX which became or would have become effective upon commencement of benefit payments, or (ii) filed with the Administrative Committee a written rejection of this automatic election which has not been withdrawn; provided, however, that no monthly benefit shall become payable hereunder to a spouse as beneficiary if such spouse is not

the same spouse to whom the former Participant was married on the date his benefit payment commenced, with respect to an automatic election under paragraph (a) of this Section 2.

6. The Plan hereby is amended by adding Section 3(h) to Article IX to provide as follows:

(h) Notwithstanding the foregoing provisions of this Section 3, if a Participant designates a person other than his spouse as his beneficiary, the present value of the total payments to be made to the beneficiary at the time the option becomes effective shall be less than 50% of the present value of the total payments to be made to the former Participant and his beneficiary combined, and if such is not the case, the monthly amount payable to his beneficiary shall be reduced to the extent necessary to satisfy such requirement. A reduction made pursuant to this paragraph (h) shall be that which is necessary to determine the Actuarial Equivalent.

7. Section 4(e) of Article IX of the Plan hereby is amended to provide as follows:

(e) (1) Subject to the approval of the Administrative Committee and except as provided in (ii), a Participant in hardship cases may revoke his election of an option under Section 3 of this Article IX at any time before it becomes effective under the provisions of (d).

(ii) A Participant or former Participant who is eligible for the automatic election provided in Section 2 of this Article IX, may file a written rejection of the automatic election or a written withdrawal of such rejection, in the form prescribed by the Administrative Committee, if such election or withdrawal is received by the Employing Company or the Administrative Committee at least 85 days prior to commencement of his benefit payments. At least 18

months before the date a Participant or former Participant attains age 55, or, if later, the date his participation commenced, the Administrative Committee shall furnish such Participant with a written description of the automatic election described in Section 2 of this Article IX and the availability of a statement of the terms and conditions of the qualified joint and survivor annuity and its financial effect on his monthly retirement benefit. Notwithstanding any other provision of this Section 4(e)(ii), in no event shall the period during which a Participant may reject or withdraw a rejection of the automatic election end prior to 90 days after the date on which such statement is furnished to the Participant.

8. The Plan hereby is amended by amending Section 5 of Article IX and by adding to Article IX, Sections 6, 7, 8, 9 and 10, to provide as follows:

Section 5. Special Joint and Survivor Annuity. Each Participant who has attained age 54, but who has not attained age 65, and who has ten or more years of Qualifying Service may elect, after his Coverage Effective Date (defined in Section 9), to receive a reduced monthly retirement benefit and preretirement survivor benefit (special joint and survivor annuity) coverage for his spouse under Sections 5 through 10 of this Article IX, in lieu of any retirement benefit otherwise payable under the Plan.

Section 6. Election Period. A Participant's election under Section 5 shall be filed with the Administrative Committee, on such form as it shall require, not earlier than 90 days before such Participant becomes eligible to make an election as provided in Section 5 and not later than the earlier of (i) such Participant's retirement or other termination of employment with the Corporation, an Employing Company, or a Related Employer, or (ii) his 65th birthday. At least six months prior to the date on which a Par-

ticipant becomes eligible to make an election as provided in Section 5, the Administrative Committee shall furnish such Participant with a written description of the pre-retirement survivor benefit and the availability of a statement of the terms and conditions of the pre-retirement survivor benefit and its financial effect on his monthly retirement benefit.

Section 7. Survivor Benefit. If a Participant who has made an election under Section 5 of this Article IX shall die after his Coverage Effective Date and before his election terminates under Section 10, a monthly payment will be made to the surviving spouse of the Participant, provided that the Participant had not retired or otherwise terminated employment with the Corporation, an Employing Company, or a Related Employer prior to his death. The amount and duration of such monthly payment to the Participant's surviving spouse shall be determined and paid as if the Participant had retired on the date immediately preceding the date of his death and had elected to receive a monthly retirement benefit under the automatic election of Section 2, based upon his Credited Service and the benefit rate in effect on the date of his death; provided, however, that the amount of the benefit so determined shall be reduced, as well, by the appropriate factor provided in Section 8 to reflect the cost of pre-retirement survivor benefit coverage under Section 5.

Section 8. Reduction of Other Benefits. The amount of any monthly retirement benefit otherwise payable under the Plan after a Participant's election terminates under Section 10 shall be reduced, in accordance with the following table, for each full year (with pro rata reduction for completed months) between the Coverage Effective Date and the date his pre-retirement survivor benefit coverage terminates. If a Participant files more than one election under

Section 5, such reduction shall be applied for the entire period during which any pre-retirement survivor benefit coverage was in effect.

Proportion of Reduced Retirement Benefit to Be Paid To Beneficiary Under Option Elected	Percentage Reduction of Retirement Benefit of Participant for Each Full Year of Coverage (With Pro Rata Reduction For Completed Months)
½	½ of 1%
⅔	⅔ of 1%
¾	¾ of 1%

Section 9. Coverage Effective Date. A Participant's "Coverage Effective Date" shall be the first date, after his election under Section 5 has been filed with the Administrative Committee, as provided in Section 6, on which the Participant has attained age 55 and has completed ten years of Qualifying Service, or, if later, the date specified in such election as the Coverage Effective Date; provided, however, that a Participant's Coverage Effective Date shall not occur before the end of the 12-month period beginning on the date his election is filed with the Administrative Committee, unless the death of the Participant is a result of accidental causes and failure to give effect to the election would deprive the survivor of the Participant of a survivor annuity.

Section 10. Termination and Revocation of Election. A Participant's election under Section 5 shall terminate automatically on the date his spouse dies, he is divorced, he retires or otherwise terminates employment, or he attains age 65, whichever is earliest. Moreover, a Participant at any time before such date, may file with the Administrative Committee a written revocation of a previous election under Section 5, and such election shall terminate on the date the revocation is filed. A Participant subsequently may file an election under Section 5 and

such election shall be treated as a new election for all purposes of Sections 5 through 10.

9. Section 7 of Article X of the Plan hereby is amended to provide as follows:

Section 7. Missing Persons. If the Administrative Committee is unable to ascertain the identity or location of a former Participant or beneficiary to whom a benefit is due and payable hereunder, the Administrative Committee may direct that such benefit shall be forfeited. Such benefit shall in no event be less than that which is fully vested hereunder, if any. However, if a claim is made for such forfeited benefit by such Participant or beneficiary, the Administrative Committee shall reinstate such forfeited benefit and shall make payment as otherwise provided under the Plan.

10. The Plan hereby is amended by adding thereto Article XVI to provide as follows:

ARTICLE XVI

MAXIMUM RETIREMENT BENEFITS

Section 1. Definitions. For purposes of this Article XVI, the following definitions shall apply in addition to those set forth in Article I:

(a) The term "employer" shall mean the Corporation and any other corporation which is a member of a controlled group of corporations (within the meaning of Section 1563(a) of the Internal Revenue Code of 1954, as amended (the "Code"), determined without regard to Section 1563(a)(4) and Section 1563(e)(3)(C) of the Code, as modified by Section 415(h) of the Code) of which the Corporation also is a member.

(b) A "limitation year" shall mean a calendar year or such other 12-month period elected by the

employer pursuant to Internal Revenue Service Regulations and rulings under Section 415 of the Code, or applicable portion thereof, commencing on or after January 1, 1976, and each such calendar year or other such 12-month period thereafter.

(c) A Participant's "projected annual retirement benefit" shall mean the annual retirement benefit which would be payable to the Participant under the Plan based on the assumption that he continues his employment as an Employee until his Normal Retirement Date and that his compensation for the limitation year continues at the same rate until his Normal Retirement Date, and on the basis of the federal Social Security Act as in effect on the last day of the limitation year. A Participant's "aggregate projected annual retirement benefit" shall include his projected annual retirement benefit under the Plan and his projected retirement benefit, if any, under any other defined benefit plan maintained by the employer.

(d) The limitations contained in this Article XVI shall be applicable only with respect to benefits provided pursuant to defined contribution plans and defined benefit plans specified in Section 415(k) of the Code.

Section 2. Maximum Defined Benefit Limitation. Subject to the provisions of Section 3, the maximum aggregate projected annual retirement benefit which may be paid to a Participant under the Plan and any other defined benefit plan maintained by an employer at any time within a limitation year may not exceed the lesser of:

(a) $80,475 (subject to adjustment annually pursuant to Internal Revenue Service Regulations under Section 415 of the Code), or

(b) 100% of the Participant's average annual compensation for his highest three consecutive years of service,

multipled by the following:

(c) the appropriate factor prescribed by the Internal Revenue Service, if the Participant's retirement benefit is to be paid in a manner other than to the Participant for life only or under Section 2 of Article IX, with the Participant's spouse as beneficiary thereunder; and

(d) the percentage determined by dividing the number of his years of Qualifying Service by 10, if the Participant has less than ten years of Qualifying Service; and

(e) a factor which converts such benefit to its actuarial equivalent commencing at age 55, if payment of the Participant's retirement benefit is to commerce prior to age 55 and the maximum described in subparagraph (a) of this Section 2 is applicable.

Section 3. Exception. If the Participant's projected annual retirement benefit does not exceed $10,000, as adjusted by the percentage shown in subparagraph (d) of Section 2 of Article XVI, if applicable, he may receive the full amount of such benefit without regard to the other limitations specified in Section 2, provided the Participant did not participate at any time in any defined contribution plan maintained by an employer.

Section 4. Manner of Reduction. If the Participant's aggregate projected annual retirement benefit exceeds limitations specified in Section 2, the reduction in the amount of his projected annual retirement benefit under the Plan shall be equal to the amount by which his aggregate projected annual retirement benefit exceeds the limitations of Section 2, multiplied by a fraction, the

numerator of which is his projected annual retirement benefit under the Plan (determined without regard to Section 2), and the denominator of which is his aggregate projected annual retirement benefit under the Plan and any other defined benefit plan maintained by an employer (determined without regard to the limitations of Section 2, or any corresponding limitation in any other defined benefit plan maintained by an employer).

Section 5. Maximum Defined Benefit and Defined Contribution Limitation. If a Participant also is covered by one or more defined contribution plans maintained by an employer concurrently with the Plan, the sum of the defined benefit plan fraction described in subparagraph (a) and the defined contribution plan fraction described in subparagraph (b) of this Section 5 in no event shall exceed 1.4 in any limitation year.

(a) The defined benefit plan fraction (determined as of the close of such limitation year) shall be a fraction the numerator of which is the aggregate projected annual retirement benefit of such Participant and the denominator of which is the maximum retirement benefit allowable under Section 2; and

(b) The defined contribution plan fraction shall be a fraction the numerator of which is equal to the sum of:

(i) total employer contributions allocated to the Participant's account or accounts maintained under all such plans during each limitation year;

(ii) total forfeitures, if any, allocated to the Participant's account or accounts maintained under all such plans during each limitation year; and

(iii) the lesser of:

(1/) one-half of the Participant's own contributions to all such plans (plus his

own voluntary contributions, if any, made under any other defined benefit plan maintained by an employer) during each limitation year; or

(2/) the Participant's own contributions to all such plans (plus his own voluntary contributions, if any, made under any other defined benefit plan maintained by an employer) during each limitation year, in excess of 6% of his compensation for the Plan Year;

and the denominator of which is the sum, for all limitation years, of the amounts determined for each such limitation year, as follows:

(iv) the lesser of:

(1/) $26,825 (subject to adjustment annually pursuant to Internal Revenue Service Regulations, and rulings under Section 415 of the Code), or

(2/) 25 percent of the Participant's compensation paid by an employer for such limitation year.

In the event that the sum of the defined benefit plan fraction and the defined contribution plan fraction would exceed the limitation of 1.4, the benefits otherwise payable to a Participant under the Plan shall be reduced to the extent necessary to meet such limitation.

* * * *

EXECUTED this 14th day of September, 1979.

Attest:

/s/ G. J. Maly Jr.
Title: Secretary

THE MEAD CORPORATION

By: /s/ G. H. Sheets
Title: Executive Vice President

AMENDMENT NO. 2
TO
THE MEAD INDUSTRIAL PRODUCTS SALARIED RETIREMENT PLAN
(January 1, 1976 Restatement)

The Plan is hereby amended in the following respects, effective May 1, 1978.

1. The first sentence of Section 3 of Article IX is hereby amended to read as follows:

> In lieu of the normal form of retirement income payable to a Participant under the terms of this Plan, such Participant may elect to receive a benefit which is the Actuarial Equivalent thereof, in any one of the following forms:

2. Subsection (e) of Section 3 of Article IX is hereby amended to read as follows:

> (e) An annuity in some other form, provided that such annuity is judged by the Administrative Committee to be in the best interests of the retiring Participant, and provided further that the Participant is able to comply with such requirements as may be prescribed by the Administrative Committee for the purpose of determining its action on his election.

3. A new subsection (i) of Section 3 of Article IX is hereby added to read as follows:

> (i) A lump sum distribution. In determining the value of such a distribution, the Administrative Committee shall employ the then current interest assumption used by the Actuary to perform its annual examination pursuant to Section 2 of Article XII.

4. Subsection (a) of Section 4 of Article IX is hereby amended to read as follows:

(a) (i) To become effective, an election of an optional form of retirement income (other than optional forms under Sections 3(e), 3(i) and 5 of this Article) must have been made either within thirty (30) days following the Effective Date of this Plan or at least thirty (30) days before the Normal Retirement Date or earlier actual retirement of the Participant.

(ii) To become effective, an election of an optional form of retirement income, as described in Sections 3(e), 3(i) and 5 of this Article must have been made either within one year following the Effective Date of this Plan or at least one year before the Normal Retirement Date or earlier actual retirement of the Participant.

(iii) Notwithstanding paragraphs (i) and (ii) above, a Participant may elect an optional form of retirement income or change his beneficiary at any time prior to his retirement if the Participant shall furnish evidence of good health satisfactory to the Administrative Committee, provided that a Participant who is retired involuntarily prior to his normal retirement date, may exercise his election of an optional form of retirement income at any time prior to his actual retirement.

5. Subsection (e) of Section 4 of Article IX of the Plan hereby is amended to provide as follows:

(e) (i) A Participant may revoke his election of an optional form of retirement income within the time limits and under the circumstances set forth in Subsection (a) above. Subject to the approval of the Administrative Committee and except as provided in (ii), a Participant in hardship cases may revoke his election of an option under Section 3 of this Article IX at any time before it becomes effective under the provisions of (d).

(ii) A Participant or former Participant who is eligible for the automatic election provided in Section 2 of this Article IX, may file a written rejection of the automatic election or a written withdrawal of such rejection, in the form prescribed by the Administrative Committee, if such election or withdrawal is received by the Employing Company or the Administrative Committee at least 30 days prior to commencement of his benefit payments. At least 18 months before the date a Participant or former Participant attains age 55, or, if later, the date his participation commenced, the Administrative Committee shall furnish such Participant with a written description of the automatic election described in Section 2 of this Article IX and the availability of a statement of the terms and conditions of the qualified joint and survivor annuity and its financial effect on his monthly retirement benefit. Notwithstanding any other provision of this Section 4(e)(ii), in no event shall the period during which a Participant may reject or withdraw a rejection of the automatic election end prior to 90 days after the date on which such statement is furnished to the Participant.

6. New Subsection (h) of Section 4 of Article IX is hereby added to read as follows:

(h) Regardless of when the election of an optional form of retirement income is made or becomes effective, the actuarial assumptions, tables and factors used to determine the appropriate Actuarial Equivalent shall be those in effect without regard to retroactive changes on the later of (i) the last date specified in paragraphs (i) or (ii) of Subsection (a) above upon which the optional form could have been elected, or (ii) the date upon which the optional form is elected pursuant to paragraph (iii) of Subsection (a).

7. In all other respects, the Plan shall remain in full force and effect.

IN WITNESS WHEREOF, the undersigned have executed this Amendment on this 2nd day of January, 1979.

THE MEAD CORPORATION

By: /s/ [Illegible]
Vice President

ATTEST:

By: /s/ G. J. Maly Jr.
Assistant Secretary

THIRD AMENDMENT
TO
THE MEAD INDUSTRIAL PRODUCTS SALARIED RETIREMENT PLAN

WHEREAS, The Mead Industrial Products Salaried Retirement Plan was established for the benefit of eligible employees; and

WHEREAS, such Plan has been amended on prior occasions, including a complete restatement effective January 1, 1976 (the "Plan"), which separately sets forth the provisions of such Plan, and the Plan has been amended on two subsequent occasions; and

WHEREAS, it is desirable to further amend the Plan;

NOW, THEREFORE, effective as of January 1, 1979, but with respect only to employees who retire, die, or otherwise terminate their employment on or after January 1, 1979, the Plan hereby is amended in the respects herein provided.

1. Section 8 of Article I of the Plan hereby is amended to provide as follows:

> *Section 8. Employee.* A regular, full-time person who is employed by an Employing Company, as determined by the Employing Company under its normal practices, and who is (i) a citizen of the United States, (ii) an alien permanently assigned to an Employing Company, as determined by the Administrative Committee, or (iii) an alien on permanent or temporary assignment who was covered by the Plan prior to January 1, 1979. The term "Employee" shall not include any person
>
> > (a) who is accruing benefits under any other employee pension benefit plan, other than the Mead Employee Stock Ownership Plan, which is qualified under Section 401(a) of the Internal Revenue Code of 1954, as amended (the

Code"), and to which the Corporation or any other controlled corporation (as that term is defined in Section 1563(a) of the Code, determined without regard to Sections 1563(a)(4) and 1563(e)(3)(C) of the Code) makes contributions; or

(b) who is participating in any employee pension benefit plan maintained in a foreign country primarily for foreign nationals.

Further, a former Employee of an Employing Company who is transferred to work as an employee for a Related Employer which is not such a controlled corporation shall continue to be an Employee unless such transferred employee (i) waives his right to accrue benefits under the Plan, (ii) is accruing benefits under a plan described in (a), or (iii) is participating under a plan described in (b). The term "Employee" includes a person described in (b). The term "Employee" includes a person who is on Approved Absence, if immediately prior to such Approved Absence, such person was an Employee.

2. Section 12(b) of Article I of the Plan hereby is amended to provide as follows:

(b) *For Minimum Retirement Income.* For purposes of determining Minimum Retirement Income under Section 3 of Article V, the average annual Earnings of a Participant during the five (5) calendar years in which his Earnings have been highest, selected from the last eleven (11) years (including his year of retirement) of his continuous employment as a Participant with the Corporation, an Employing Company or a Related Employer before his Early Retirement Date, Normal Retirement Date, or the date on which he terminates his employment with a vested interest, whichever comes first.

3. Section 12(c) of Article I of the Plan hereby is amended to provide as follows:

(c) *Determination.* In the event that an Employee has less than five (5) years of such con-

tinuous employment, the Final Average Earnings shall be the average of all complete calendar years prior to his Normal Retirement Date.

For purposes of paragraph (a), in the event that a Participant has less than one full year of continuous employment, Final Average Earnings will be based on the January 1, 1976 Earnings on an annualized basis.

4. Section 6 of Article III of the Plan hereby is amended to provide as follows:

Section 6. Reemployment. Upon the remployment by the Corporation, an Employing Company or a related Employer of a Participant who was terminated without any vested benefit, the Participant shall receive Credited Service.

(a) for his continuous employment as a Participant earned prior to his attaining age 65 and prior to his termination of employment, if the period of his break in employment is less than his period of employment which occurred prior to the break, or

(b) for the period of the break in employment which occurred prior to his attaining age 65, if the Participant is reemployed within the 12-month period which follows his date of termination of employment.

Upon the reemployment by the Corporation, an Employing Company or a Related Employer of a Participant who had terminated with a vested benefit, he shall receive Credited Service for his service with the Corporation or an Employing Company as a Participant which occurs prior to his attaining age 65 and for which he had Earnings.

5. Section 1 of Article IV of the Plan hereby is amended to provide as follows:

Section 1. Eligibility For Normal Retirement. Each Participant who retires on or after the date

he attains age 65 from employment with the Corporation, an Employing Company and a Related Employer (i) shall be eligible for a monthly normal retirement benefit in an amount computed in accordance with the provisions of Article V, and (ii), as of the date on which he attains age 65, shall have a fully vested and nonforfeitable interest in his monthly normal retirement benefit. A Participant's Normal Retirement Date means the first day of the month coincident with, or next following the date on which he attains age 65. On or after January 1, 1979, no Employee may continue in the employ of the Corporation, an Employing Company or a Related Employer after he has attained age 70 unless otherwise provided by State law.

6. The first sentence of Section 1 of Article V of the Plan hereby is amended to provide as follows:

Section 1. Amount of Retirement Income.

A Participant who retires on or after his Normal Retirement Date shall be enitled to a monthly normal retirement benefit equal to the greater of the amounts specified in paragraph (a) or (b) for all years prior to January 1, 1976 and prior to age 65, plus the amount specified in paragraph (c) for all years after December 31, 1975 and prior to age 65, as follows:

7. Section 4(a) of Article IX of the Plan hereby is amended to provide as follows:

Section 4. Conditions Relative to Optional Forms of Retirement Income.

(a)(i) To become effective, a Participant's election of an optional form of payment of his retirement income (other than the optional forms of payment provided under the terms of Sections 3(e), 3(i) and 5 of this Article IX) must be

made either within 30 days following the Effective Date of the Plan or at least 30 days before his normal Retirement Date or earlier actual retirement.

(ii) To become effective, a Participant's election of an optional form of payment of his retirement income, as described in Sections 3(e), 3(i) and 5 of this Article IX, must be made either within one year following the Effective Date of the Plan or at least one year before his Normal Retirement Date or earlier actual retirement.

(iii) Notwithstanding the provisions of (i) and (ii), a Participant may elect an optional form of payment of his retirement income or change his beneficiary at any time prior to the earlier of his attaining age 65 or his retirement date, if he furnishes evidence in good health satisfactory to the Administrative Committee; and provided, further, that a Participant who is retired involuntarily prior to his Normal Retirement Date, may exercise his election of an optional form of payment of his retirement income at any time prior to his actual retirement.

8. Section 3(c) of Article X of the Plan hereby is amended to provide as follows:

(c) In any case where the payment of a retirement benefit provided by the terms of the Plan to a Participant ceases due to his reemployment by the Corporation, an Employing Company or a Related Employer, the amount of his retirement benefit which will be paid on his subsequent retirement shall be determined actuarially on the basis of, as applicable, his increased service (if any) prior to the date on which he attains age 65, age, contributions (if any), amount of retirement benefit which was paid to him prior to his reemployment, and any other factors which are relevant to such a determination.

*   *   *   *

EXECUTED at Dayton, Ohio, this 28th day of December, 1979.

THE MEAD CORPORATION

By /s/ C.H. Gebhardt, V.P.
Title:

Attest:

/s/ [Illegible]
Title:

FOURTH AMENDMENT
TO
THE MEAD INDUSTRIAL PRODUCTS
SALARIED RETIREMENT PLAN

WHEREAS, The Mead Industrial Products Salaried Retirement Plan was established for the benefit of eligible employees; and

WHEREAS, such Plan has been amended and restated on prior occasions, including a complete restatement effective as of January 1, 1976, which was executed on December 28, 1977 (the "Plan"), which separately sets forth the provisions of such Plan, and the plan has been amended on three prior occasions; and

WHEREAS, it is desirable to further amend the Plan in accordance with action taken by the Board of Directors in January, 1981;

NOW, THEREFORE, effective as of January 1, 1981, but with respect only to Employees who retire, die or otherwise terminate their employment on or after January 1, 1981, the definition of Earnings contained in Article I, Section 11(a) of the Plan is amended to provide as follows:

Section 11. Earnings.

(a) *For Years After December 31, 1975*:

Amounts paid by an Employing Company to an Employee, amounts paid by a Related Employer to a former Employee of an Employing Company now employed by a Related Employer, and amounts paid by a Related Employer to a current Employee prior to his transfer to an Employing Company, for services, excluding:

(i) Amounts paid other than in cash;

(ii) Gifts;

(iii) Amounts paid pursuant to a long-term incentive plan;

(iv) Amounts deferred by an Employee pursuant to a plan or agreement of deferred compensation;

(v) Amounts paid pursuant to a special arrangement, agreement or contract between the Employing Company or Related Employer and an individual Employee, except as provided by the Corporate Benefits Committee;

(vi) Twenty percent of all commissions paid to an Employee whose compensation is wholly or partially determined on the basis of gross commissions; provided, however, that this exclusion shall not apply to an Employee whose sales-related expenses are reimbursed by the Employing Company or Related Employer; and

(vii) Amounts received by an Employee as reimbursement for relocation costs.

IN WITNESS WHEREOF, the undersigned have executed this Amendment on this 30th day of January, 1981.

THE MEAD CORPORATION

By /s/ Lee Bauman
Vice President

Attest:

By /s/ [Illegible]

FIFTH AMENDMENT
TO
THE MEAD INDUSTRIAL PRODUCTS SALARIED RETIREMENT PLAN
(January 1, 1976 Restatement)

WHEREAS, The Mead Industrial Products Salaried Retirement Plan was established for the benefit of eligible employees; and

WHEREAS, such Plan has been amended and restated on prior occasions, including a complete restatement effective as of January 1, 1976, which was executed on December 28, 1977 (the "Plan"), which separately sets forth the provisions of such Plan, and the plan has been amended on four prior occasions; and

WHEREAS, it is desirable to further amend the Plan;

NOW, THEREFORE, effective as of January 1, 1981, but with respect only to Employees who retire, die or otherwise terminate their employment on or after January 1, 1981, Section 4 of Article III of the Plan is amended and a new Section 8 is added to Article V as follows:

Section 4. Approved Absence. For the purpose of this Plan, Credited Service shall be preserved during Approved Absence, but any calendar year after the applicable Effective Date during the entirety of which an Employee is on such Approved Absence and as to which no Earnings are payable to the Employee shall not be credited for the purposes of this Plan.

* * * *

Section 8. Offsets for Other Retirement Benefits. A Participant's retirement income calculated under Sections 1 and 3 of this Article V shall be reduced by any retirement income, expressed as an annual income payable for life, which he is eligible to receive from a tax-qualified retirement plan of the Employing Company or a Related

Company and which is attributable to Credited Service used in computing his retirement income under the Plan.

IN WITNESS WHEREOF, the undersigned have executed this Amendment on this 23rd day of October, 1981.

THE MEAD CORPORATION

By /s/ R. W. Baumann

Attest:

By /s/ [Illegible]

SIXTH AMENDMENT
TO
THE MEAD INDUSTRIAL PRODUCTS
SALARIED RETIREMENT PLAN
(January 1, 1976 Restatement)

WHEREAS, The Mead Industrial Products Salaried Retirement Plan was established for the benefit of eligible employees; and

WHEREAS, such Plan has been amended and restated on prior occasions, including a complete restatement effective as of January 1, 1976, which was executed on December 28, 1977 (the "Plan"), which separately sets forth the provisions of such Plan, and the Plan has been amended on five prior occasions; and

WHEREAS, it is desirable to further amend the Plan;

NOW, THEREFORE, effective as of January 1, 1982, but with respect only to Employees who retire, die or otherwise terminate their employment on or after April 1, 1982, a new subsection (c) of Section 2 is added to Article V of the Plan, and a new subsection (i) of Section 4 is added to Article IX as follows:

(c) A Participant who elects an Early Retirement Date in accordance with the conditions of this Subsection shall be entitled to a retirement income supplement for life, payable monthly in conjunction with his retirement income, in an annual amount which is equal to (i) the retirement income he would receive if his Early Retirement Date were his Normal Retirement Date, minus (ii) the amount of retirement income to which he is entitled under Subsection (a) above. An electing Participant must have attained age fifty-five (55) and accrued at least ten (10) years of service as of January 1, 1982. At that date, he must be either (i) actively employed on a regular payroll or (ii) receiving short-term disability pay-

ments in the nature of salary continuation. He must elect the retirement supplement between January 1 and February 28, 1982, and retire on April 1, 1982; provided, however, that each Employing Company's retirement to a date not later than April 1, 1983. Participants otherwise eligible for the retirement supplement who do not make a timely election in accordance with the foregoing sentence shall not be entitled to the supplement at any time.

* * * *

(i) Notwithstanding Subsections (d) and (e) above, a Participant who had attained his Normal Retirement Date prior to April 1, 1982, and who had not then retired, may revoke his election of an optional form of retirement income and substitute another option therefor; provided he actually retires on April 1, 1982, or such later date on or before April 1, 1983, to which his Employing Company defers his retirement.

IN WITNESS WHEREOF, the undersigned have executed this Amendment on this 28th day of June, 1982.

THE MEAD CORPORATION

By /s/ R. W. Baumann
Vice President

Attest:

By /s/ [Illegible]
Assistant Secretary

[LETTERHEAD OF
PENSION BENEFIT GUARANTY CORPORATION]

(November 29, 1983)

In reply refer to: 110-50962
Name of Plan: Mead Industrial Products Salaried Retirement Plan

R. E. Emrick
Mead Corporation
World Headquarters
Courthouse Plaza Northeast
Dayton, Ohio 45463

Dear Mr. Emrick:

The Pension Benefit Guaranty Corporation (PBGC) received the information required to demonstrate sufficiency relating to the termination of the above-identified Plan. Based on this, the Corporation is issuing the enclosed Notice of Sufficiency in accordance with Section 4041(b) of the Employee Retirement Income Security Act of 1974 (ERISA).

Upon receipt of the Notice of Sufficiency, you have 90 days to complete the termination of the Plan in accordance with Subtitle C, Title IV of ERISA.

Please note that in order to remove your plan from the PBGC-1 Form and premium billing mailing list, Subpart C of 29 CFR Part 2615, requires you to submit to PBGC within 60 days after the completion of the distribution of plan assets, a certified statement that the plan assets were allocated in accordance with Section 4044 of ERISA, and also include the following information:

(1) For each participant or beneficiary to whom distribution was made—

(a) Name,

(b) Address,

(c) Telephone number,

(d) Sex,

(e) Date of birth,

(f) Social security number,

(g) The amount of benefit provided and unless previously submitted, the basis for computing the amount,

(h) The cost of providing the benefit, and

(i) The form in which the benefit was provided.

(2) If annuity contracts were purchased from an insurer, the name of the insurer and the policy number(s); and

(3) The place or places where plan records will be held.

Please note the enclosed booklet regarding establishment of IRAs.

Sincerely,

/s/ Lance L. Len
Case Officer, CPD 2/3
Division of Case Processing
(202) 254-7873

Enclosure

[LETTERHEAD OF
PENSION BENEFIT GUARANTY
CORPORATION]

Date: November 29, 1983

NOTICE OF SUFFICIENCY

Name of Plan: Mead Industrial Products Salaried Retirement Plan

Date of Termination: August 1, 1983

Proposed Date of Distribution: December 31, 1983

Based on the information you supplied us, we hereby find that the assets of this Plan will be sufficient as of your proposed date of distribution to discharge when due all obligations of the Plan with respect to guaranteed benefits.

This finding is made under the Employee Retirement Income Security Act of 1974, Section 4041(b), 29 U.S.C. 1341(b).

/s/ Lance L. Len
Case Officer
Case Processing Division, 2/3
(202) 254-7873

INTERNAL REVENUE SERVICE
District Director

Department of the Treasury
P.O. Box 2508, Cincinnati, OH 45201

Person to Contact: Jim Sandy
Telephone Number: 513-684-3947
Refer Reply to: EP/EO
Date: April 29, 1986

File Folder Number: 310002047
Re: The Mead Industrial Products Salaried Retirement Plan

(Received March 31, 1988)

The Mead Corporation
Mead World Headquarters
Courthouse Plaza N.E.
Dayton, Ohio 45463

Dear Sir or Madam:

We have considered the information you sent us and have determined that your termination of this plan does not adversely affect its qualification for Federal tax purposes. Please note that this is not a determination regarding the effect of other Federal or local statutes.

Even though you have terminated this plan, we would like to remind you of certain filing obligations. The related tax-exempt trust, custodial account, or other payers who are responsible for making payments may be required to file information returns on Forms W-2P or 1099R, with Forms W-3 or 1096, respectively, for

amounts paid or made available to any individual or beneficiary.

In addition, you must continue to file a Form 5500 series return annually until all plan assets are distributed. The last return required is the one filed for the year in which distribution is completed. Be sure to write "Final Return" across the top of this return.

Your plan's qualified status will be adversely affected if plan assets are returned to you before the plan's liabilities to all plan participants are satisfied by the purchase of guaranteed annuity contracts or the making of lump sum distributions. When you receive these excess plan assets, you should notify the Service of the date(s) you receive such assets and the date(s) guaranteed annuity contracts were purchased, or the date(s) of the payment of lump sum distributions for all participants.

Proposed date of termination is August 1, 1983.

This determination includes consideration of the response to our request for technical advice. Attached is a copy of this response.

This determination letter does not apply to any provisions of the Tax Equity and Fiscal Responsibility Act of 1982.

You should keep this letter in your permanent records.

If you have any questions, please contact the person whose name and telephone number are shown above.

Sincerely yours,

/s/ James J. Ryan
District Director

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 90-3463, 90-3540

DAVID A. NOBERS, INDIVIDUALLY
and on BEHALF OF HIMSELF and
ALL OTHERS SIMILARLY SITUATED,
Appellant in No. 90-3463

vs.

CRUCIBLE INC. 1975 SALARIED RETIREMENT PLAN,
Appellant in No. 90-3540

On Appeal From the United States District Court
For the Western District of Pennsylvania

(D.C. Civil No. 88-1237)

District Judge: Honorable Glenn E. Mancer

Submitted Pursuant to Third Circuit Rule 12(6)
January 10, 1991

BEFORE: STAPLETON, GREENBERG, and SEITZ,
Circuit Judges

(Opinion filed Jan. 29, 1991)

MEMORANDUM OPINION OF THE COURT

STAPLETON, *Circuit Judge*:

Former employees of Crucible, Inc. ("the employees") here appeal from an order of the district court dismissing their claim of entitlement to unreduced early retirement subsidies pursuant to the Crucible, Inc., 1975 Salaried Retirement Plan ("the Plan"). The employees claim that ERISA mandates the payment of such subsidies before any residual assets can revert to the employer, Crucible. The Plan cross-appeals from the portion of the district court's order denying the Plan's request for attorney's fees. We have jurisdiction under 28 U.S.C. § 1291. We will affirm both aspects of the district court's order.

We engage in plenary review of the decision of the district court granting summary judgment in favor of the Plan. *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). We review the court's decision concerning attorney's fees for an abuse of discretion. *Ursic v. Bethlehem Mines*, 719 F.2d 670, 673 (3d Cir. 1983).

The case bears a striking resemblance to *Ashenbaugh v. Crucible, Inc., 1975 Salaried Retirement Plan*, 854 F.2d 1516 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 3155 (1989). The facts are the same and will not be recounted here.

Normal pension benefits accrue over the course of employment and vest periodically. The Plan employs a normal retirement age of 65. When an employee reaches the age of 65, the employee can retire and his or her full pension will be based on the benefits that have accrued over his or her years of service. The Plan decreases the benefits of those employees who retire prior to the age of 65. Thus, the employee's pension is normally "actuarily" reduced by a given percentage for each month he or she is shy of his or her 65th birthday. The employees here claim entitlement to early retirement subsidies. These subsidies supplement the actuarily reduced pension benefits of certain employees who retire before the age of 65.

The early retirement provision of the Plan grants a subsidy to employees who retire "early" (i.e., prior to the normal retirement age of 65) if they have thiry years of service and are at least 62 years old. Qualifying early retirees receive monthly pension checks equal in amount to those of their 65 year old co-workers with identical service records. An alternative provision of the plan provides more limited subsidies to employees with 30 years of service who are not yet 62. If an employee never attains thirty years of service, or chooses not to retire until the age of 65, he or she does not receive early retirement subsidies under the Plan.

The employees argue that the early retirement subsidies constitute "liabilities of the plan" within the meaning of § 4044(d)(1)(A) of ERISA.[1] Section 4044 (d)(1)(A) provides as follows: "*Distribution of residual assets; remaining assets.* Any residual assets of a single employer plan may be distributed to the employer if . . . [a]ll liabilities of the plan to participants and their beneficiaries have been satisfied." The employees accordingly conclude that provision must be made for the early retirement subsidies before any Plan assets may revert to Crucible. We cannot accept this conclusion.

The Pension Benefit Guaranty Corporation ("PBGC") is the government corporation created to administer and enforce Title IV of ERISA. Title IV concerns the termination of plans. Accordingly, the PBGC's views on questions like the one before the court are entitled to deference. In *Mead Corp. v. Tilley*, 490 U.S. 714, 109 S. Ct. 2156 (1989), the Supreme Court remanded to the Court of Appeals for the Fourth Circuit with instructions to hear argument concerning the same "liabilities of the Plan" theory the employees are advancing here. The Court counseled, "[i]n deciding these issues, the Court

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[1] The Supreme Court left this question open in *Mead Corp. v. Tilley*, 490 U.S. 714, 109 S. Ct. 2156 (1989).

of Appeals should consider the views of the PBGC and the IRS. For a court to attempt to answer these questions without the views of the agencies responsible for enforcing ERISA would be to 'embar[k] upon a voyage without a compass.' " 109 S. Ct. at 2164.

In the present case, the district court observed that, "[t]he Supreme Court has stated that '[a] reviewing court is also to be guided by the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." ' " Dist. Ct. Op. at 6 (*quoting E.I. du Pont de Nemours & Co. v. Collins*, 432 U.S. 46, 55 (1977)). With this principle in mind, we set forth the views espoused in the PBGC's amicus brief.

Since its inception, the PBGC has taken the position that the "liabilities of the plan" that must be satisfied under § 4404(d) are coextensive with the benefits included in the priorities of § 4404(a). "Thus, if a benefit is not required to be assigned to an asset allocation category under section 4044(a)(1)-(6), there can be no liability for that benefit under section 4044(d)(1)(A)." PBGC Amicus Brief at 5.[2] We conclude that this reading of § 4044(d)(1)(A) is both reasonable and supported by the legislative history. Accordingly, we accept it.

Section 4044(a)(1)-(6), entitled "Order of priority of participants and beneficiaries," provides as follows:

> In the case of the termination of a single-employer plan, the plan administrator shall allocate the assets of the plan (available to provide benefits)

---

[2] In addition to its brief, the PBGC's regulations state that "[i]f a plan has assets remaining after satisfaction of all benefits in priority categories 1 through 6 [of § 4044(a)], those residual assets shall be allocated in accordance with section 4044(d) of the Act." 29 C.F.R. § 2618.10(d). Thus, if the claimed benefit is not one that must be assigned to one of the categories under § 4044(a), it is not a liability of the fund under § 4044(d).

among the participants and beneficiaries of the plan in the following order:

(1) First, to that portion of each individual's accrued benefit which is derived from the participant's contributions to the plan which were not mandatory contributions.

(2) Second, to that portion of each individual's accrued benefit which is derived from the participant's mandatory contributions.

(3) Third, . . . benefits payable as an annuity . . . .

(4) Fourth—

(A) to all other benefits (if any) of individuals under the plan guaranteed under this subchapter . . . .

(5) Fifth, to all other nonforfeitable benefits under the plan.

(6) Sixth, to all other benefits under the plan.

Section 4044(a), 29 U.S.C. § 1344(a).

Subsections (1) through (5) of § 4044(a) list in order of priority five different kinds of nonforfeitable benefits. We held in *Ashenbaugh* that an employee's expectancy of an early retirement subsidy prior to his or her having rendered the required years of service was not a nonforfeitable benefit. Taking issue with the Second Circuit's decision in *Amato v. Western Union Int'l Inc.*, 773 F.2d 1402 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 1113 (1986), we further concluded in *Ashenbaugh* that such an expectancy of an early retirement subsidy was not the kind of forfeitable benefit which comes within the scope of subsection (6) of § 4044(a). 854 F.2d at 1528-29.

Adopting the PBGC's reading of § 4044(d)(1)(A) as we do and accepting the conclusions reached in *Ashenbaugh* as we must, we are constrained to hold that the

employee's expectations of early retirement subsidies are not "liabilities" within the meaning of § 4044(d)(1)(A). The employees urge that we reconsider *Ashenbaugh.* Given that the PBGC endorses the conclusions that we there reached, we would be reluctant to abandon those conclusions even if we were free to do so. But, in any event, we are not. *See* Internal Operating Procedures of the United States Court of Appeals for the Third Circuit 9.1.

Finally, we turn to the subject of attorney's fees. Section 502(g) of ERISA, 29 U.S.C. 1132(g), provides that "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." The Plan appeals from the district court's order denying the Plan's request for attorney's fees. Reviewing the court's decision for abuse of discretion, we find no abuse. While the issues presented here and in *Ashenbaugh* are closely related, this proceeding was a good faith effort to pursue a theory arguably supported by the Supreme Court's actions in *Mead Corp. v. Tilley,* 490 U.S. 714, 109 S. Ct. 2156 (1989).

The judgment of the district court will be affirmed.

TO THE CLERK:

Please file the foregoing Memorandum Opinion.

/s/ Walter K. Stapleton
Circuit Judge

[SEAL]

U.S. Department of Justice
Tax Division

SDP:ORA:MJRoach:yc
5-24-O

Washington, D.C. 20216
December 27, 1989

John M. Graecen, Esquire
Clerk, U.S. Court of Appeals
for the Fourth Circuit
Room 402, U.S. Courthouse
10th & Main Streets
Richmond, Virginia 23219

Re: B. E. Tilley, et al, v. Mead Corporation
(4th Cir.—No. 86-3858)

Dear Mr. Graecen:

In its opinion of June 5, 1989, reversing this Court's original decision in this ERISA case, and remanding the matter for further proceedings, the Supreme Court noted that, on remand, this Court should consider the views of the Internal Revenue Service as well as those of the Pension Benefit Guaranty Corporation. (Slip op. at 11.) The purpose of this letter is to advise the Court of the view of the Internal Revenue Service.

The issue on remand in this case is whether, prior to the enactment of the Retirement Equity Act of 1984 (REA), Pub. L. No. 98-397, 98 Stat. 1426, early retirement benefits such as those provided in the Mead-sponsored pension plan, constituted "liabilities" of the plan before any excess assets could revert to the plan's sponsor. See Section 401(a)(2) of the Internal Revenue Code (26 U.S.C.). It is the position of the Internal Revenue Serv-

ice that such pre-REA early retirement benefits were not plan liabilities within the meaning of Section 401(a)(2) of the Code, notwithstanding the fact that such benefits constituted "accrued benefits" for plan amendment purposes under Section 411(d)(6) of the Code. See *Amato* v. *Western Union, Int'l, Inc.*, 773 F.2d 1402 (2d Cir. 1985). That position is set forth in detail in a letter of January 16, 1986, from the Acting Assistant Commissioner (Employee Plans and Exempt Organizations) and the Chief Counsel of the Internal Revenue Service to the General Counsel of the PBGC, which Mead has obtained and reproduced in an appendix to its brief to this Court. We have been authorized by the Internal Revenue Service to advise the Court that the views expressed in that letter continue accurately to reflect that agency's position on this issue and to further inform the Court that the Internal Revenue Service's consistent administrative practice in reviewing pre-REA plan terminations was to treat early retirement benefits as outside the scope of Section 401(a)(2).

Because the copy of the forementioned letter of January 16, 1986, as reproduced in the appendix to Mead's brief contains certain printing errors, we are enclosing four copies of that letter and request that you distribute one copy thereof, together with one of the enclosed copies of this letter, to each member of the panel assigned to this case. We are also sending copies of the instant letter and the letter of January 16, 1986, to counsel for parties and the *amici curiae* in this case.

Sincerely yours,

SHIRLEY D. PETERSON
Assistant Attorney General
Tax Division

By: /s/ Gary R. Allen
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16 Jan. 1986

Edward Mackiewicz
General Counsel
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2020 K Street, N.W.
Washington, D.C. 20006-1806

Dear Mr. Mackiewicz,

Rr: Amato, et al. v. Western Union, et al., 773 F.2d 1402 (2nd Cir. 1985)

This letter is in response to your request made at the meeting of January 10, 1986, that we furnish you with our views regarding the inapplicability of the *Amato* decision to situations involving plan terminations. Western Union has filed a petition for certiorari to the Supreme Court seeking review of the Second Circuit's decision that a 1982 plan amendment eliminating two unreduced early retirement benefit options was in violation of I.R.C. sec. 411(d)(6). The benefits affected in *Amato* are now protected in the context of both plan amendments and plan terminations by virtue of the Retirement Equity Act of 1984 ("REA"), Pub. L. 98-397, 98 Stat. 1426.

The concern you expressed was whether the court's holding that the plan amendment impermissibly reduced accrued benefits could be extended to plan terminations for the pre-REA period. We believe this different treatment for *Amato*-type benefits in plan amendment situations versus plan termination situations was recognized by Congress and does not expose the PBGC to any unforseen liability. The applicable statute, regulations, rulings, and legislative history cited by the Court as the basis for its holding make clear that pre-REA such bene-

fits were only protected by I.R.C. sec. 411(d)(6) from reduction by a plan amendment and not a plan termination.

At issue in *Amato* were ERISA sec. 209(g) and I.R.C. sec. 411(d)(6) which provide that:

> A plan shall be treated as not satisfying the requirements of this section if the accrued benefit of a participant is decreased by an *amendment* of the plan . . . . [Emphasis supplied.]

Shortly after the enactment of sec. 411(d)(6), the I.R.S. published Treas. Reg. sec. 1.411(d)-(3) dealing with the effect of plan amendments on accrued benefits. It states in relevant part:

> Under section 411(d)(6) a plan is not a qualified plan (and a trust forming a part of such plan is not a qualified trust) if a plan *amendment* decreases the accrued benefit of any plan participant, unless *the plan amendment* satisfies the requirements of section 412(c)(8) (relating to certain retroactive amendments) and the regulations thereunder. [Emphasis supplied.]

The Second Circuit found this interpretation of I.R.C. sec. 411(d)(6) as applied to plaintiffs' early retirement benefits to be "neither 'unreasonable [nor] plainly inconsistent with' the Code itself [citation omitted]", *Amato*, *supra*, at p. 1411. Therefore the I.R.S. interpretation protecting these benefits from decrease by plan amendments was found to be valid.

The court also directly noted Revenue Ruling 81-12, 1981-1 C.B. 228, in reaching its conclusion. The ruling states in relevant part:

> Section 411(d)(6) of the Code and section 1.411(d)-3(b) of the regulations do not preclude a change in the actuarial basis. They do, however, preclude a change from decreasing a participant's accrued benefit. If the actuarial basis is being changed by a *plan*

> *amendment* and, as a result, any participant's accrued benefit may decrease, there are several acceptable methods that may be specified in the plan to prevent a decrease in an accrued benefit and a violation of section 411(d)(6) [Emphasis supplied.]

The ruling, like the regulation, only asserted the protection for these benefits from reduction by plan amendment. As enunciated in the amicus brief filed by the Department of Justice on behalf of the I.R.S. and as cited by the Second Circuit, the I.R.S. is the primary authority in construing the Internal Revenue Code ("Code"). *See Bob Jones Univ. v. United States*, 461 U.S. 574, 596 (1983). In this role the I.R.S., in the absence of express legislative enactment, recognized that there was no authority to extend such protection to Amato-type benefits in the event of plan termination. In addition to its primary authority in interpreting the Code, long standing I.R.S. administrative practices such as those here "continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law [citations omitted]", *Amato, supra,* at p. 1411.

The I.R.S. policy of limiting the protection of these benefits only to the context of plan amendments is not only to be given great weight but is also borne out by the legislative history accompanying REA. In its initial consideration of the bill the House provided that sec. 411(d)(6) as reenacted state as follows:

> (B) TREATMENT OF CERTAIN PLAN AMENDMENTS.—For purposes of subparagraph (A), a plan amendment which has the effect of—
>
> (i) eliminating or reducing a subsidy or an early retirement benefit, or
>
> (ii) eliminating an optional form of benefit, with respect to benefits accrued before the amendment shall be treated as reducing accrued benefits. *In the*

> *case of a terminated plan the preceding sentence shall not apply to a subsidy where the conditions for the subsidy have not been satisfied at the time of termination.* [Emphasis supplied.] H.R. Rep. No. 655, Pt. 2, 98th Cong., 2d Sess. 78 (1984).

The House Committee on Ways and Means reported that

> [i]n adidtion, present law provides that a qualified plan generally may not be *amended* in a manner that decreases the benefits of any participant accrued prior to the amendment [footnote omitted]. [Emphasis supplied.] H.R. Rep. No. 655, Pt. 2, 98th Cong., 2d Sess. 25 (1984).

The Committee then stated that I.R.S. rulings (i.e. Rev. Rul. 79-90, 1979-1 C.B. 155 and Rev. Rul. 81-12, *supra*) dealing with protection of these benefits in the context of plan amendments were to be codified.

> The bill codifies present law generally precluding the elimination or reduction of benefits that have already been accrued by employees. Although the bill prohibits the elimination or reduction of a benefit through a *plan amendment* . . . it does not prevent prospective changes in benefits. [Emphasis supplied.] H.R. Rep. No. 655, *supra*, 26-27.

When the bill moved to the Senate there was concern that *Amato*-type benefits should receive the same treatment when affected by plan termination as when affected by plan amendment under prior law.

> The [Senate] bill does not provide an exception to the prohibition against reduction of benefits or elimination of benefit options in the case of a terminated plan. Accordingly, a plan is not considered to have satisfied all of its liabilities to participants and beneficiaries until it has provided for payment of contingent liabilities with respect to a participant who, after the date of the termination of a plan,

> meets the requirements for a subsidized benefit. S. Rep. No. 575, 98th Cong. 2d Sess. 28, *reprinted in* 1984 U.S. Cong. & Ad. News 2547.

In light of this important change the Senate Report noted that the bill clarifies the scope of the prohibition against "decreases in the accrued benefit of a participant but that the committee intends that no inference is to be made on the basis of this clarification as to the scope of the prohibition before the effective date of the provision." S. Rep. No. 575, *supra.*

When the bill returned to the House for reconsideration Rep. Roukema, cosponsor of the bill and ranking Republican on the Subcommittee on Labor-Management Relations, noted that the bill as amended by the Senate to now apply to *Amato*-type benefits upon termination went far beyond the original House codification of Rev. Ruls. 79-90 and 81-12.

> It should be noted that while this bill, as amended by the other body, retains the major features of the House passed legislation, as a result of the Finance Committee action the bill contains an *important change in current law* having a far-reaching effect in eliminating currently perceived abuses occurring when overfunded pension plans are terminated and the excess assets revert to the employer. As described in the technical explanation of H.R. 4280 reported by the Committee on Finance a plan is not to be considered, pursuant to section 301 of the bill, to have satisfied all of its liabilities to participants and beneficiaries until it has provided for the payment of contingent liabilities with respect to a participant who, after the date of the termination of a plan, meets the requirements for a subsidized benefit. *This change from present law* means that for sufficient plans, depending on the circumstances, some or all of the plan assets that would otherwise revert to the employer will not have to be allocated to participant

benefits. [Emphasis supplied.] 130 Cong. Rec. H8763 (daily ed. August 9, 1984).

While the legislative history of a subsequent Congress is not necessarily determinative for inferring the intent of an earlier one, *see Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102 (1980), "such views are entitled to significant weight and particularly so when the intent of the enacting Congress is obscure." *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980). Subsequent legislative history is accorded even greater weight where such history consists of explicit statements as to statutes unchanged during the period in question and where members of the applicable committees were present during that period. *See Walt Disney Productions v. United States*, 480 F.2d 66 (9th Cir. 1973). In addition, via reenactment and extention of an existing statute Congress may be deemed to sanction existing I.R.S. regulations and rulings. *See, e.g., Hejvering v. R.J. Reynolds Tobacco Co.*, 306 U.S. 110 (1939).

In 1974 Congress did not address with clarity the issue of either plan amendments or plan terminations and their effect on unreduced early retirement benefits. The I.R.S. in its role as interpreter of the Code therefore extended the protection against reduction of *Amato*-type benefits by plan amendment only as far as the statute allowed. The explicit statements of veteran committee members also acknowledged the pre-REA limits of sec. 411(d)(6) as applied by the I.R.S. Accordingly, the legislative history describing this section which recognizes this pre-REA distinction is entitled to great weight.

It is also clear that treating *Amato*-type benefits as accrued benefits does not affect the liability of the PBGC as to these benefits either pre or post-REA.

> To the extent that participants meet the plan requirements for eligibility for benefits after the date of plan termination even though these benefits are

> treated as accrued benefits under section 301, the benefits are not to be allocted to the four asset priority categories set forth in ERISA section 4044(a)(1) through 4044(A)(4.) Such benefits may be allocated to subsequent asset priority categories, however. 130 Cong. Rec. H8756 (daily ed. August 9, 1984).

The *Amato*-type benefits would not be allocated to these four categories and thus would not affect PBGC liability.

In certain circumstances a participant may satisfy the conditions of a subsidized benefit prior to plan termination after a plan amendment has eliminated such benefit. Under *Amato* the subsidized benefit already accrued at the time of plan amendment would be protected and, if conditions are subsequently satisfied, would upon plan termination be given a higher priority category via ERISA secs. 4044(a)(1) through (a)(4). If the plan terminated with insufficient assets then PBGC liability for this benefit might be affected. Nonetheless, any liability is expected to be de minimis and, as evidenced by the legislative history, and resulting liability is consistent with recognized I.R.S. position.

Western Union's second argument in its petition for certiorari deals with the court's statement that ERISA sec. 4044(a)(6), describing the sixth asset allocation caegory on plan termination, is not limited to accrued benefits. Regardless of the validity of this statement we believe it does not affect PBGC liability for such benefits nor raise a question of sufficient importance justifying Supreme Court review. As noted previously, the legislative history indicates that the absence of PBGC liability for *Amato*-type benefits remains unchanged from prior law. Additionally, the I.R.S. in its application of sec. 411(d)(3) has applied the partial termination rules only to accrued benefits to the extent funded and not to all "other benefits". Finally, the court's statement regarding the scope of ERISA sec. 4044(a)(6) constitutes, at best, *obiter dicta* and therefore does not represent binding

precedent. *See In re Grand Jury Matter*, 768 F.2d 525 (3rd Cir. 1985); *Lowder v. United States*, 492 F.2d 953 (4th Cir. 1974). *Obiter dicta* are "words of an opinion entirely unnecessary for the decision of the case". *Black's Law Dictionary*, 5th Ed. (1979). The Second Circuit having already determined that plaintiffs' benefits were accrued benefits did not need to discuss the scope of ERISA sec. 4044(a)(6) and therefore such discussion constitutes *obiter dicta*.

In conclusion we believe the legislative history discussing the I.R.S. pre-REA interpretation of I.R.C. sec. 411(d)(6) amply supports the conclusion that the protection of that section cannot be extended to *Amato*-type benefits in plan termination situations. The favorable result obtained in *Amato* is important for the I.R.S. enforcement of protection of plan participants from reduction of their accrued benefits via plan amendment for the pre-REA period. At the same time this important result does not extend to plan terminations and does not increase the potential liability of the PBGC. Therefore *Amato* is properly limited to the facts arising therein.

We look forward to our agencies reaching an agreed position on this issue so we may soon inform the respective litigants of our decision.

Sincerely,

/s/ Robert I. Brauer
ROBERT I. BRAUER
Acting Assistant Commissioner
(Employee Plans and Exempt
(Organizations)

FRED T. GOLDBERG, JR.

By: /s/ Daniel F. Folzenlogen
DANIEL F. FOLZENLOGEN
Special Appellate Counsel

BRIEF OF AMICUS CURIAE PENSION BENEFIT GUARANTY CORPORATION IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 86-3858

B.E. TILLEY, *et al.*,
Plaintiffs-Appellants,

v.

THE MEAD CORPORATION,
Defendant-Appellee.

On Remand from the Supreme Court of the United States

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IN THE UNITED STATES COURT OF APPEALS
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No. 86-3858

B.E. TILLEY, *et al.*,
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BRIEF OF AMICUS CURIAE PENSION BENEFIT GUARANTY CORPORATION IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

STATEMENT OF INTEREST

The Pension Benefit Guaranty Corporation ("PBGC") is a wholly owned United States government corporation established by section 4002 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1302, to administer and enforce the provisions of Title IV of the statute. The agency's Board of Directors is composed of the Secretaries of Labor, Treasury, and Commerce. *Id.* Title IV of ERISA, 29 U.S.C. §§ 1301-1461,

governs the termination of defined benefit pension plans. The single-employer pension plan termination insurance program in Title IV covers over 30 million participants in more than 110,000 defined benefit pension plans voluntarily established by employers in the private sector.

This case is before this Court on remand from the Supreme Court of the United States. It involves important issues under Title IV. In particular, the case involves section 4044 of ERISA, a key provision governing the allocation and distribution of pension plan assets at plan termination. Section 4044(a) establishes six priority categories of benefits to which assets must be allocated in succession when a plan terminates. The last of these categories, section 4044(a)(6), provides for the allocation of assets to "all other benefits [not provided under categories 1 to 5] under the plan." 29 U.S.C. § 1344 (a)(6). Section 4044(d)(1) then permits the distribution of any residual assets to the employer if, *inter alia*, "all liabilities of the plan . . . have been satisfied," and "the plan provides for such a distribution in these circumstances." 29 U.S.C. § 1344(d)(1)(A), (C).

The plaintiffs in this case rely on section 4044 to claim entitlement to certain subsidized early retirement benefits under the Mead Industrial Products Salaried Retirement Plan ("Plan"), even though they did not qualify for those benefits when the Plan terminated. In their view, their employer, The Mead Corporation ("Mead"), was not entitled to a reversion of residual assets until such benefits were paid. However, from the time it was established in 1974 until after the enactment of the Retirement Equity Act of 1984 ("REA"), Pub. L. No. 98-397, 98 Stat. 1426 (1984), the PBGC did not include unearned early retirement subsidies as "accrued benefits" within category six at plan termination. *See* 40 Fed. Reg. 51368, 51370 (Nov. 4, 1975). Therefore, PBGC did not require the payment of such benefits as liabilities under section 4044(d)(1)(A) before a reversion of residual assets.

Nor did the Internal Revenue Service ("IRS") consider such benefits as termination liabilities prior to REA.

In its initial decision in this case, a panel of this Court held that section 4044(a)(6) required the payment of unearned, subsidized early retirement benefits even if those benefits were not accrued at the time of plan termination. *Tilley v. Mead Corp.*, 815 F.2d 989, 992 (4th Cir. 1987) (*reh'g denied*). The Supreme Court reversed that decision, but remanded the case for consideration of the plaintiffs alternative arguments in support of their claim for unreduced early retirement benefits: (1) whether unreduced early retirement benefits are "accrued benefits" under ERISA; and (2) whether unreduced early retirement benefits are "liabilities" within the meaning of section 4044(d)(1)(A) that must be satisfied before a reversion ocurs. *Mead Corp. v. Tilley*, 490 U.S. 714, 726 (1989). The Supreme Court was "reluctant to address these complicated and important issues pertaining to the private pensions of millions of workers" without the views of "the agencies responsible for enforcing ERISA." *Id.* Accordingly, the Supreme Court directed this Court to "consider the views of the PBGC and the IRS." *Id.*

On remand, the PBGC filed an *amicus curiae* brief addressing both remanded issues, and participated in oral argument. Although the IRS did not file a brief, it made its views on the issues known to the Court prior to oral argument by way of a letter to the Clerk dated December 27, 1989, from the Chief of the Appellate Section, Tax Division, United States Department of Justice ("DOJ Letter"). Consistent with the views expressed in the PBGC's brief and the DOJ letter, the panel unanimously concluded that the unearned subsidized early retirement benefits at issue are not "accrued benefits" within the meaning of ERISA or the Internal Revenue Code ("Code").[1]

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[1] Because this case is governed by the law in existence in 1983, citations to the Code in this brief refer to the Internal Revenue Code of 1954 in effect in 1983, unless specifically noted.

However, Judge Murnaghan, writing for a majority of the panel (Judge Widener concurred), declined in Part III of the opinion to "adjudicate the issue, beset with problems," of whether the unearned subsidies are "liabilities" within the meaning of Section 4044(d)(1)(A) of ERISA. Maj. Op. at 11.[2] Instead, the majority decided, with reference only to section 4044(d)(1)(C) of ERISA, that the terms of the plan itself require the payment of subsidized early retirement benefits in this case. In the majority's view, it is unnecessary to look to other provisions of ERISA or the Code because the benefits at issue here are "contingent rights" within the meaning of the plan document and the excess assets that reverted to Mead were not "due to actuarial error" as required by the Plan. Maj. Op. at 13-17.

The PBGC supports Mead's petition for rehearing and suggestion for rehearing en banc with respect to Part III of the majority opinion. Rehearing is warranted because, as Judge Chapman stated in his dissent, the majority disregarded the Supreme Court's mandate to address the question whether unearned subsidized early retirement benefits are "liabilities" within the meaning of section 4044(d)(1) of ERISA. The majority also disregarded the terms of ERISA and the Code, instead interpreting terms of art in the Plan by reference to everyday meanings. Dis. Op. at 21-22, 35-38. In doing so, the majority necessarily "discard[ed] the views submitted by the amici curiae," including PBGC and various actuarial associations, and "ultimately delay[ed] the development of the law." Dis. Op. at 22. In fact, the majority dismissed these important considerations as nothing more than "a mishmash of statutory provisions, regulations, legislative history, and actuarial lore." Maj. Op. at 11.

Finally, the majority failed to consider a development in the law subsequent to the Supreme Court mandate:

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[2] The majority opinion of the Panel will be cited as "Maj. Op." and the dissenting opinion as "Dis. Op."

the January 29, 1991 decision of the United States Court of Appeals for the Third Circuit in *Nobers, et al. v. Crucible Inc. 1975 Salaried Retirement Plan*, Nos. 90-3463, 90-3540 (3d Cir. 1991) ("*Nobers*"), holding unanimously that unearned subsidized early retirement benefits are not "liabilities" of the plan under section 4044(d)(1)(A).[3] In reaching this decision, the *Nobers* panel accorded considerable deference to the views of the PBGC. By failing even to consider those views in the instant case, the majority has created a conflict.

ARGUMENT

THE MAJORITY'S DISPOSITION OF THE "LIABILITIES" ISSUE DISREGARDS THE DIRECTIONS OF THE SUPREME COURT AND THE VIEWS OF THE ADMINISTERING AGENCIES, AND IS INCONSISTENT WITH THE PANEL'S HOLDING ON THE ACCRUED BENEFITS ISSUE

Relying on the language of Article XIII, § 4(f) of the Plan, a majority of the panel decided that plan assets could not revert to Mead before payment of the pensioners' subsidized early retirement benefits because: "(1) the funds in the Plan that have been set-aside in expectation of fulfilling the[se] . . . benefits did not remain in the Plan 'due to actuarial error'; and (2) the benefits at issue are 'contingent rights' that must be paid prior to any reversion." Maj. Op. at 14.

The majority decision ignores the Supreme Court's mandate to analyze the meaning of "liabilities" under section 4044(d)(1)(A) of ERISA. It ignores the well-established meaning of the term "liabilities" under section 4044 of ERISA, and section 401(a)(2) of the Code and Treasury regulations thereunder. And, finally, the

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[3] By letter dated February 14, 1991, counsel for Mead sent a copy of the *Nobers* opinion to the Clerk of this Court, pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure.

decision ignores the views of the PBGC and the IRS, as well as the views of other *amici* based on their historical practical experience.[4] The majority rests its decision instead on "the lay world" definition of "contingent" in *Webster's New Collegiate Dictionary* and *Black's Law Dictionary*, Maj. Op. at 16. The decision accordingly well illustrates the folly of "reading technical pension language as if it were ordinary English." *Wise v. Ruffin*, 914 F. 2d 570, 575 n.5 (4th Cir. 1990) (Murnaghan, J.), quoting *Riley v. MEBA Pension Trust*, 570 F.2d 406, 408-09 (2d Cir. 1977).

Section 4044(a) provides rules for the allocation of assets upon plan termination. Once the assets are allocated in accordance with section 4044(a), section 4044(d)(1) authorizes the reversion of any residual assets to employers if, *inter alia*, "all liabilities of the plan to participants and their beneficiaries have been satisfied." As the PBGC argued in its *amicus* brief and the Third Circuit held in *Nobers*, the "liabilities of the plan" that must be satisfied under section 4044(d) of ERISA are "coextensive with the benefits included in the priorities of section 4044(a)." *Nobers*, slip op. at 4-5. Thus, "if a benefit is not required to be assigned to an asset allocation category under section 4044(a)(1)-(6), there can be no liability for that benefit under section 4044(d)(1)(A)." *Id.*

Unaccrued benefits are not included in any of the section 4044(a) priority categories. Indeed, as the Su-

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[4] Indeed, as the dissent points out, the majority ignores even the very terms of the Plan upon which it purports to rely. The Plan requires the payment, prior to the reversion, of "contingent rights *accrued* under the Plan." (Emphasis added.) In relying on dictionary definitions, however, the majority reads the word "accrued" right out of the Plan, disingenuously reasoning that to do otherwise would be to give credence to an oxymoron. Maj. Op. at 17. As the dissent states, such a construction "is clearly improper when ERISA and the Code, and their regulations, make feasible an interpretation that gives meaning to each and every word in the Plan." Dis. Op. at 38.

preme Court held, section 4044(a) "in no way indicates an intent to confer a right upon plan participants to recover unaccrued benefits." 490 U.S. at 722. Thus, the panel's unanimous decision that unearned subsidized early retirement benefits are not "accrued benefits" leads ineluctably to a conclusion that such benefits cannot be "liabilities" within the meaning of section 4044(d)(1)(A). To conclude otherwise, as the majority did, is to assume "that the word 'liabilities' in § 4044(d)(1)(A) has a substantive meaning of its own." Dis. Op. at 24. It does not. Instead, like section 4044(a), section 4044(d) is merely a distribution mechanism, and not a source of new entitlements. *See* 490 U.S. at 723. Therefore, the only source of liabilities under section 4044(d) "is the accrual and vesting provisions outlined in Title I, which sets forth an elaborate framework to determine an employee's right to benefits." Dis. Op. at 24.

The result is the same under Code section 401(a)(2), the counterpart to Section 4044(d)(1)(A) of ERISA. Like Section 4044(d), section 401(a)(2) does not create liabilities. Rather, under Code section 401(a)(2), the only sources of liabilities are the benefit accrual and vesting provisions of section 411 of the Code, the benefits required by Code section 401(a)(11), and the terms of a plan. Of course, section 401(a)(2) and the regulations thereunder (particularly Treas. Reg. § 1.401-2(b)) provide for the satisfaction of all "fixed and contingent" liabilities. This rule pre-dated ERISA, and was not changed by the enactment of that statute. However, under Treas. Reg. § 1.401-2(b) and Rev. Rul. 61-157 (which required vesting on termination), fixed liabilities were benefits for which participants had met all requirements for entitlement prior to plan termination. Contingent liabilities were those benefits accrued prior to termination to which employees might have become entitled had the plan continued. Thus, as the dissent notes, the "contingent liabilities" referred to in the series of pre-ERISA Revenue Rulings are the "benefit credits *accrued* up to

the time of termination." Dis. Op. at 26-27 (emphasis added).[5] Consequently, under the Code as under ERISA, if the subsidies are not accrued benefits, then they are not liabilities." *Id.*

The majority, of course, deliberately disregarded these longstanding ERISA and Code provisions and principles. The opinion of the dissent, on the other hand, is fully consistent with the manner in which both the PBGC and the IRS administered their respective statutes prior to the 1984 enactment of REA. Before REA, the PBGC did not require the payment of unearned, subsidized early retirement benefits as liabilities under section 4044(d)(1)(A) before a reversion could occur. And, before REA, it was the consistent practice of the IRS in reviewing plan terminations to treat early retirement benefits as outside the scope of Section 401(a)(2) of the Code, notwithstanding that such benefits constituted "accrued benefits" for plan amendment purposes under section 411(d)(6) of the Code. *See* DOJ Letter; Rev. Rul. 83-52.

The majority similarly ignored the longstanding Code definition of "actuarial error." In the majority's view, the term references only "computational error resulting from inaccurate statistical assumptions." Maj. Op. at 14. But, as the dissent stated, "the majority analyzes this term in a vacuum, deliberately ignoring the term's obvious origins in Treas. Reg. § 1.401-2(b)." That regulation, like Rev. Rul. 83-52, adopts a broad construction of the term "erroneous actuarial computation" and uses it interchangeably with the term "actuarial error." The majority therefore should at least have considered the long-

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[5] These pre-ERISA Revenue Rulings were merely a precursor of the present day Code section 411(d)(3), requiring vesting upon termination. All that requirement means is that a participant must vest at plan termination in the pro rata portion of his or her normal retirement benefit accrued up to that point, to the extent that benefit was then funded. These "accrued" normal retirement benefits are the "contingent obligations" referred to in Treas. Reg. § 1.401-2(b)(2), the fixed obligations being those of participants who had met all of the conditions required to receive a benefit.

standing IRS construction. It is simply inconceivable that the drafters of the Mead Plan intended by that term anything other than the meaning attached to it by the IRS.[6]

Finally, the majority disregards the import of the REA amendments to ERISA in 1984. In the majority's view, those amendments are merely "another complication" in this case. It goes on to speculate that the law "might have been enacted" to remove uncertainty. Maj. Op. at 12 n. 3. By contrast, the dissent fully analyzes the effect of REA, noting that its enactment would have been redundant if ERISA had already provided the rights that the plaintiffs claim. Indeed, plaintiff's claims go beyond what REA requires, and, if credited, mean that REA actually reduced the protections afforded to early retirement subsidies, a result that the dissent correctly noted is "unlikely." Dis. Op. at 35.

The logic of the dissent, which is firmly based on the interpretations and administrative practices of the PBGC and the IRS prior to REA, is compelling. No provision of ERISA or the Code creates the benefit entitlements the majority awarded here. Nor can section 4044(d)(1)(C) or the Plan's terms be read in a vacuum to provide plaintiffs the benefits they claim. Because the majority's everyday construction of terms of art used in the Plan does violence to the established meaning of those terms under the Code and ERISA, its opinion in effect resuscitates the result of the original panel decision, which the Supreme

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[6] As noted by Mead in its Petition for Rehearing, the majority's approach to interpreting the Plan provision in issue overlooked the opinion of the Supreme Court in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), and various opinions of this Court construing the appropriate standard of review of plan administrators' interpretations of plan language under the *Bruch* doctrine. While that argument is beyond the scope of the PBGC's brief, we note that PBGC would regard as reasonable a plan administrator's construction of plan language that was consistent with the established meaning of terms of art under ERISA, the Code, and rulings and regulations thereunder. *See* Dis. Op. at 35-38.

Court reversed. Moreover, the majority opinion elevates mere benefit expectations under a plan into entitlements, a theory soundly rejected by the Eleventh Circuit sitting *en banc* in *Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164, 1175 (11th Cir. 1988). It should not be permitted to stand.

CONCLUSION

Based upon the foregoing PBGC respectfully submits that the Court should grant rehearing and rehearing en banc and that Part III of the decision of the panel should be reversed.

Respectfully submitted,

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